Petition

81-1232

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NO. 81-_____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

The States of Texas, Louisiana, and Oklahoma
Petitioners,

v.

Federal Energy Regulatory Commission and
United States of America,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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December 21, 1981

QUESTION PRESENTED

Whether Congress constitutionally may compel, albeit not by specific statutory directive, the states to utilize their own resources and personnel to administer one of its economic regulatory schemes.

PARTIES BELOW

The States of Texas, Oklahoma, Louisiana, and Wyoming, and Ralph L. Harvey and Marlin Oil Corporation were plaintiffs-appellants below. The Federal Energy Regulatory Commission and the United States of America were defendants-appellees.

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IN THE
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The States of Texas, Louisiana, and Oklahoma
Petitioners,

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Federal Energy Regulatory Commission and
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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners, the States of Texas, Louisiana, and Oklahoma, hereby request certiorari to review the portion of the September 22, 1981 decision of the United States Court of Appeals for the Tenth Circuit holding that the Natural Gas Policy Act of 1978, 15 U.S.C. §§3301 *et seq.* (Supp. 1981) does not compel states to administer a federal regulatory program, in violation or degradation of states' fundamental constitutional rights.

OPINIONS BELOW

The September 22, 1981 decision of the court of appeals which is reported as Oklahoma v. Federal Energy

Regulatory Commission, 661 F.2d 832 (10th Cir. 1981), appears as Appendix A. The June 4, 1980 decision of the district court, 494 F. Supp. 636 (W. D. Okla. 1980), which is reported as Oklahoma v. Federal Energy Regulatory Commission, appears as Appendix B.

JURISDICTION

The judgment of the court of appeals was entered on September 22, 1981. See Appendix C. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS

The Constitution, and the Natural Gas Policy Act of 1978, 15 U.S.C. §§3301 *et seq.* (Supp. 1981), are invoked. Pertinent provisions are set forth in the Statutory Appendix.

STATEMENT OF THE CASE

The States of Oklahoma, Texas, and Louisiana brought this action against the Federal Energy Regulatory Commission (FERC or the Commission) for the declaratory judgment, pursuant to 28 U.S.C. §2201, that the Natural Gas Policy Act of 1978, 15 U.S.C. §§3301 *et seq.* (Supp. 1981) (the Act), is unconstitutional insofar as it applies to wholly intrastate sales of natural gas, and in that it impairs the ability of plaintiff states to function effectively in a federal system, and in that it coerces plaintiff states to administer and enforce a federal regulatory scheme. Permission to intervene as parties plaintiff was granted to the State of Wyoming and to Ralph L. Harvey, individually and as president of the Marlin Oil Corporation, an Oklahoma corporation

engaged in exploration for, and production and sale of, natural gas in Oklahoma. The United States of America was permitted to intervene as a party defendant. Defendants moved to dismiss certain of plaintiffs' claims and for summary judgment as to the remaining claims, and plaintiffs also moved for summary judgment. The district court denied defendants' motion for summary judgment on all of plaintiffs' claims and denied plaintiffs' motions for summary judgment, upholding the constitutionality of the Act in all respects. Plaintiffs appealed from the district court's rulings on the motions for summary judgment. The United States Court of Appeals for the Tenth Circuit affirmed the decision of the district court. Petitioners now seek this Court's review of the court of appeals' ruling that the Act does not unconstitutionally coerce states to administer and enforce a federal regulatory scheme.

ARGUMENT

It is clear from this Court's holding in *National League of Cities v. Usery*, 426 U.S. 833 (1976), that states may not be compelled to administer a federal program. Although the Court in *Hodell v. Virginia Surface Min. & Reclam. Ass'n*, ____U.S.____, 101 S.Ct. 2389 (1981), subsequently may have narrowed the application of *League of Cities*, it did not alter its earlier recognition that the Constitution guarantees "the States' freedom to structure integral operations in areas of traditional governmental functions" and prohibits federal impairment of essential attributes of state sovereignty. 426 U.S. at 852. The decision of the court of appeals below either is in direct conflict with that doctrine, or it has created an exemption to that doctrine warranting this Court's review.

Regulation of Natural Gas Pricing

Prior to passage of the Act but subsequent to this

Court's decision in *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954), the Federal Power Commission (succeeded by the FERC) regulated sales and prices at the wellhead of natural gas which was deemed to be in interstate commerce. Regulation of intrastate natural gas was left to the states, who generally allowed free market forces to determine the wellhead price. Beginning in the early 1970's, those market forces produced wellhead prices for intrastate gas which were substantially higher for intrastate gas than for interstate gas, the price of which was determined on a general cost-of-production basis. The relatively higher price for intrastate natural gas fostered significant exploration efforts. When natural gas was discovered, it understandably was sold in the intrastate market; the artifically low regulated price created shortages in the interstate market.

Rather than remove the restrictive forces of the regulated market which created the interstate shortage, Congress chose, in passing the Act, to extend federal regulation to intrastate natural gas. Subchapter I of the Act establishes maximum wellhead prices for various categories of natural gas based upon various factors, including the date drilling began on a well, the depth of the well and its location in relation to other wells, the volume of gas produced, definition of the reservoir from which gas is produced, prior sales of gas in intrastate or interstate commerce, and the expiration dates and other provisions of sales contracts. All natural gas, whether intrastate or interstate, became subject to these complex pricing provisions, although certain categories of natural gas were to be deregulated by 1985.

The purpose of the Act was two-fold. First, Congress wished to obtain for the interstate market those supplies of intrastate gas which had been discovered in response to unregulated intrastate prices and discovery of which had been financed by intrastate consumers willing to pay those prices. Second, Congress wished to

eliminate the alternative intrastate market, thereby making future supplies available to interstate consumers. Congress realized, however, that the unrealistically low regulated prices prevailing in the interstate market had created the shortage. It then attempted to establish prices for various categories of natural gas which Congress felt would be adequate to compensate producers and encourage new production.

The Act Effectively Compels States To Administer A Federal Program

At the time of the passage of the Act no federal agency possessed the facilities, personnel, or expertise necessary to make the determinations of various natural gas categories required by Subchapter I of the Act. Rather than attempt to establish a federal agency which could make those determinations, Congress drafted the Act so as to compel state agencies, which existed to enforce state conservation laws, to make the determinations for the federal government. Prior to passage of the Act, however, holdings of three courts of appeals had demonstrated that Congress' authority to regulate commerce did not confer upon it the authority to compel state officials to administer a federal program.[1] Moreover, following this Court's decision in *League of Cities, supra,* the federal government demonstrated its own recognition that it could not directly compel states to administer federal programs.[2] Therefore, in drafting the Act, Congress wanted to compel state enforcement of its regulatory program without that compulsion appearing clearly on the face of the statute.

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[1]*District of Columbia v. Train,* 521 F.2d 971 (D.C. Cir. 1975), *vacated,* 431 U.S. 99 (1977); *Brown v. E.P.A.,* 521 F.2d 827 (9th Cir. 1975), *vacated,* 431 U.S. 99 (1977); and *Maryland v. E.P.A.,* 530 F.2d 215 (4th Cir. 1975), *vacated,* 431 U.S. 99 (1977).

[2]*EPA v. Brown,* 431 U.S. 99 (1977)

Under Subchapter V, 15 U.S.C. §§3471 *et seq.* (Administration, Enforcement, and Review), collection of the maximum prices permitted by Subchapter I for any sale of natural gas is made dependent on the pricing determinations which must be made by an authorized regulatory agency in order to assign the gas to a Subchapter I category. Even the interim collection of ceiling prices prior to a final pricing determination depends on the seller's filing with the agency authorized to make pricing determinations a petition for a determination and a "written sworn statement" that the seller "believes in good faith that such natural gas is eligible" for the requested ceiling price. 15 U.S.C. §3413(e).

Subchapter V speaks consistently of these determinations being made by a federal or state agency (indeed, Section 3413(c) is headed simply "State authority"), as if state agency determinations were an alternative to federal determination. The "Federal agency" referred to, however, is nowhere identified or specified, and the reference is clearly not to the FERC, which is invariably referred to as "the Commission" and which is authorized to enter into agreements with and to review the determinations of the "Federal agency." In regard to natural gas produced from non-federal lands, however, there was, and is, no federal agency other than the FERC with, as the Act requires [Sec. 3413(c)(1)], "regulatory jurisdiction with respect to the production of natural gas."

Subchapter V [Sec. 3413(c)] purports to grant to a state regulatory agency a conditional right exercisable "only by a written agreement" with the Commission -- and provides that in the event of waiver "the Commission shall ... make the determinations." The Commission, however, was not given, did not have, and does not now have the capability of making the required determinations, and the Commission has made clear in its regulations that it does not intend to make these deter-

minations. 18 C.F.R. §273.202(c),(d). The net result as to onshore gas is that the pricing determinations would have to be made by state regulatory agencies or they would not be made at all. Since Congress made the pricing requirements of Subchapter I effective immediately upon enactment, if the necessary determinations were not made, the prices permitted by the Act could not be collected, and as a practical matter, the natural gas industries of plaintiff states could not continue to operate. If the states were given an option, it was a simple one: Administer the Act or see their major industries and employers shut down.[3]

Review is Necessary

Petitioners are seeking review of the portion of the court of appeals decision which affirmed the district court's grant of a summary judgment for respondents that the Act does not impermissibly compel states to administer a federal economic regulatory scheme. Rule 56, Fed. R. Civ. P., permits the grant of a summary judgment only when "there is no genuine issue as to any material fact." 6 J.Moore, W. Taggart, & J. Wicker, Moore's Federal Practice, ¶56.04 (2d ed. 1981). For purposes of summary judgment, petitioners assertions, *supra*, that the Act effectively compels state administra-

[3]Arguments and assertions presented in this, as well as the preceeding, subsection are substantially similar and at times identical to points stressed in the courts below. Although important elements to petitioners' complaint and presented now to apprise the Court of petitioners' position, elaboration and citation of authority is omitted here because, as amplified *infra*, the issue before the Court is not the validity or merit of those arguments and assertions, but rather, whether such should be considered at all.

tion must be deemed undisputed.[4] The court of appeals' decision, therefore, must have held that (i) Congress constitutionally may compel states to administer federal programs, or (ii) compulsion must be demonstrated by the face of the statute and the consideration of the statute's actual effect is impermissible. Either holding would be incorrect and would warrant this Court's review.

This Court's decision in *Hodel v. Virginia Surface Min. & Reclam. Ass'n.*, _____U.S._____, 101 S.Ct. 2389 (1981), did not alter its recognition in *National League of Cities v. Usery*, 426 U.S. 833 (1976), that "there are limits upon the power of Congress to override state sovereignty." 427 U.S. at 842. The Act's imposition of administrative burdens upon states clearly is a proscribed attempt to override state sovereignty. "Congress may not exercise [its commerce power] so as to force directly upon the States its choice as to how essential decisions regarding the conduct of integral governmental functions are to be made." 427 U.S. at 855.

Congress here attempts to force states to establish a regulatory framework to implement a federal scheme. Such an attempt is not only proscribed by *League of Cities*, but also was noted as improper by several courts of appeals in decisions pre-dating *League of Cities*. In *District of Columbia v. Train*, 521 F.2d 971 (D.C. Cir. 1975), the court of appeals reviewed regulations of the Environmental Protection Agency (EPA) which required states to submit a plan to implement and enforce air quality standards established by the federal agency.

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[4]Although proper summary judgment pursuant to Rule 56 requires that no material issue of fact be in dispute, even when cross motions are filed, J. Moore, *supra*, ¶56.13, respondents attempted to refute peitioners' factual allegations as late as four weeks after oral argument of the cause in the court of appeals. Appellee's Second Supplemental Memorandum, *Oklahoma v. FERC*, (10th Cir., Aug. 13, 1981).

In the absence of an approved plan, the EPA was authorized to establish and implement its own plan. The court of appeals first interpreted the act as not authorizing the EPA to require states to enact statutes and regulations or to take certain other actions "that are necessary in order to complete the regulatory scheme." 521 F.2d at 986. The court then held that, although air pollution may be regulated by Congress under the commerce power, the act exceeded Congress' authority because it violated the Tenth Amendment if it authorized the EPA "to force the states to administer EPA-promulgated transportation control programs." *Id.* at 988. "[T]he Administrator [of the EPA] in the exercise of federal power based solely on the commerce clause, cannot against a state's wishes compel it to become involved in administering the details of the regulatory scheme promulgated by the Administrator." *Id.* at 991-92. That would be

> an impermissible encroachment on state sovereignty and goes beyond "regulation" by the Congress. It seeks, under the guise of the commerce power, to substitute compelled state regulation for permissible federal regulation.
>
> * * *
>
> In essence, the Administrator is here attempting to commandeer the regulatory powers of the states, along with their personnel and resources, for use in administering and enforcing a federal regulatory program against the owners of motor vehicles.

Id. at 992. *Brown v. EPA*, 521 F.2d 827 (9th Cir. 1975) and *Maryland v. EPA*, 530 F.2d 215 (4th Cir. 1975) considered analogous circumstances and reached similar conclusions.[5]

[5]This Court, in *EPA v. Brown*, 431 U.S. 99 (19077), vacated and remanded each of the three decisions for consideration of mootness.

Although the opinion of the court of appeals is obscure (Appendix A), the court apparently did not intend to hold that Congress may compel states to administer and enforce federal regulatory schemes. Rather, the court's discussion and citation of the district court's opinion below as well as this Court's opinion in *Hodel v. Virginia Surface Min. & Reclam. Ass'n., supra*, indicate that it believed that the superficial provisions of the Act did not establish compulsion and that the Act therefore was not unconstitutional.[6] The court of appeals reached its conclusion in the face of petitioners' claims that, in fact, compulsion was present. The court paid no heed to the assertion, deemed correct by operation of Rule 56, that there was no federal agency in existence, and that Congress purposely failed to create an agency, to serve as an alternative for state enforcement and that as a factual matter, if the states did not enforce the Act, it would go unenforced. Moreover, the court below either ignored petitioners' argument that if the Act were unenforced, the major industries in their states would shut down, or it deemed that apprehension to be immaterial or not coercive.

In considering the propriety of the court of appeals decision, the primary question which arises is whether the court was correct in holding, effectively, that the district court need not look beyond the superficial language of the Act to determine whether the Act coerced the states to administer a federal program. This Court has noted that "[i]t is true that a statute attacked as vague must initially be examined 'on its face,' but it does not follow that a readily discernable dividing line

[6]Superficially, of course, the Act indicates that if states do not provide administration, either the federal government will administer the Act or the Act will go unenforced. Superficially, then, the states are not directed to enforce the Act. Petitioners assertions regarding the actual effect of the congressional scheme were presented in plaintiffs' amended complaint (Appendix E).

can always be drawn, with statutes falling neatly into one of the two categories of 'valid' or 'invalid' solely on the basis of such an examination." *United States v. National Dairy Products Corp.*, 372 U.S. 29, 32 (1963). "A statute not objectionable on its face may be adjudged unconstitutional because of its effect in operation. "*Bennett v. Coddingham*, 290 F.Supp. 759, 763, (N.D. Ala. 1968), *aff'd*, 393 U.S. 317 (1969). Petitioners submit that summary judgment was improperly granted in this cause and that this case should be remanded for trial to determine whether the statute unconstitutionally coerces the states to administer one of Congress' economic regulatory schemes.

CONCLUSION

For the foregoing reasons, certiorari should be granted and the case should be set for briefing and oral argument.

Respectfully submitted,

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Appendix

APPENDIX

A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

THE STATE OF OKLAHOMA, by and through LARRY DERRYBERRY, ATTORNEY GENERAL OF THE STATE OF OKLAHOMA; DAVID L. BOREN, GOVERNOR OF THE STATE OF OKLAHOMA; THE STATE OF TEXAS, by and through JOHN L. HILL, ATTORNEY GENERAL OF THE STATE OF TEXAS; DOLPH BRISCOE, GOVERNOR OF THE STATE OF TEXAS; THE STATE OF LOUISIANA, by and through WILLIAM J. GUSTE, JR., ATTORNEY GENERAL OF THE STATE OF LOUISIANA; EDWIN EDWARDS, GOVERNOR OF THE STATE OF LOUISIANA; SHIRLEY McNAMARA, SECRETARY OF THE LOUISIANA DEPARTMENT OF REVENUE AND TAXATION; and WILLIAM C. HULS, SECRETARY OF THE LOUISIANA DEPARTMENT OF NATURAL RESOURCES,
Plaintiffs-Appellants,

SEPTEMBER 22, 1981

THE STATE OF WYOMING, by and through its Attorney General; RALPH

L. HARVEY, individually and as president of MARLIN OIL CORPORATION,

Intervenors-Appellants,

V.

FEDERAL ENERGY REGULATORY COMMISSION,

Defendant-Appellee,

UNITED STATES OF AMERICA,

Intervenor-Appellee.

Appeal From the United States District Court
For the Western District of Oklahoma
(D.C. No. CIV-78-01251-T)

Lino A. Graglia, Austin, Texas (William Pannill and Gary Catron of Pannill and Hooper, Houston, Texas; Mark White, Attorney General, John W. Fainter, Jr., First Assistant Attorney General, James R. Meyers, Gayle Johnson Cipriano, Andrew Kever and John Stuart Fryer, Assistant Attorneys General, the State of Texas, Austin, Texas; Jan Eric Cartwright, Attorney General, and John F. Percival, Assistant Attorney General, the State of Oklahoma, Oklahoma City, Oklahoma; William J. Guste, Jr., Attorney General, Carmack M. Blackmon and Gary L. Keyser, Assistant Attorneys General, the State of Louisiana, and Mary Ellen Leeper, Special Counsel, Baton Rouge, Louisiana; John D. Troughton, Attorney General, and Thomas J. Carroll, III, Assistant Attorney General, the State of Wyoming; with him on the brief), for Plaintiffs-Appellants and Intervenors-Appellants.

Jerome Nelson, Acting General Counsel, Federal Energy Regulatory Commission, and Bruce G. Forrest, Attorney, Department of Justice (Jerome M. Feit, Dep-

uty Solicitor, J. Paul Douglas, Assistant Solicitor, and Joanne Leveque, Attorney, Federal Energy Regulatory Commission; Thomas S. Martin, Acting Assistant Attorney General, Robert S. Greenspan, Dina R. Lassow, and Paul A. Gaulker, Attorneys, Civil Division, Department of Justice, with him on the brief), Washington, D.C., for Defendant-Appellee and Intervenor-Appellee.

Before BARRETT, DOYLE and McKAY, Circuit Judges.

BARRETT, Circuit Judge.

This case involves a constitutional challenge to the National Gas Policy Act of 1978, 15 U.S.C.A. § 3301 *et seq.* (Supp. 1979), (NGPA or Act).

The States of Oklahoma, Texas and Louisiana initiated this action against the Federal Energy Regulatory Commission (FERC) seeking a declaratory judgment holding the Act to be unconstitutional insofar as it applies to wholly intrastate gas, impairs the ability of the states to function effectively in a federal system, and forces and coerces the states to administer a federal regulatory scheme. Within its answer FERC moved to dismiss certain claims and for summary judgment.

The State of Wyoming and Ralph L. Harvey[1], individually and as president of Marlin Oil Corporation, an Oklahoma corporation engaged in the exploration for and production and sale of natural gas in Oklahoma, were permitted to intervene as parties plaintiff. The United States of America[2] was also permitted to intervene as a party defendant.

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1. Hereinafter, for convenience, collectively referred to, with the States of Oklahoma, Texas and Louisiana, as States.

2. Hereinafter collectively referred to, with FERC, as FERC.

The district court denied FERC's motion to dismiss and States' motion for summary judgment, but granted FERC's motion for summary judgment upholding the constitutionality of the Act in all respects.[3] A brief history of the Act and the prior regulation of the natural gas industry will facilitate our review.

Natural gas was first regulated in 1938 with the enactment of the Natural Gas Act of 1938 (NGA), 15 U.S.C.A. §§ 717 *et seq.*, which regulated the transportation and sale of natural gas in interstate commerce. Under the NGA the Federal Power Commission[4] regulated interstate natural gas pipelines and, following the decision of the Supreme Court in *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954), regulated the wellhead price of gas sold for resale in interstate commerce. Wholly intrastate gas, *i.e.*, gas produced, sold and consumed within a state, was not regulated under NGA. This resulted, generally, in higher prices of intrastate gas.

Under NGA, two separate natural gas markets developed, a regulated interstate market and an unregulated intrastate market. Bifurcation of the natural gas market did not, until the late 1960's and early 1970's, create serious market disorders, because supply exceeded demand and new reserve additions exceeded annual production. H.R. Rep. No. 95-496, Part IV, 95th Cong. 1st Sess., 90 (1977). It was, however, during the late 1960's and early 1970's that Congress became intimately aware of the market distortions created by the bifurcated market as the price disparity between interstate and intrastate gas increased substantially. This prompted many producers to sell their production in the intrastate, rather than interstate market, resulting in shortages of

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3. Reported below at 494 F.Supp. 636 (W.D. Okl. 1980).

4. Predecessor to FERC.

natural gas in nonproducing states, and thereby resulting in the intrastate market securing the majority of new production. "The NGPA was Congress' solution to the necessity of encouraging production and exploration of new natural gas sources and maintaining adequate supplies of natural gas in the interstate market." [494 F.Supp. at p. 5].

The provisions of NGPA, insofar as they are relevant for purposes of this appeal, include: Title I, which establishes price ceilings for all first sales of natural gas irrespective of its interstate or intrastate character; Title II, which provides for a pass-through of the costs incurred by interstate pipelines to industrial users and which, while not applicable to intrastate pipelines, prohibits the States from enacting or enforcing any conflicting regulations; Title IIIB, which authorizes sales between interstate and intrastate pipelines in accordance with certain non-discriminatory contractual requirements imposed by FERC; and Title V, which provides for the administration of the Act.

The States' complaint, as amended and supplemented, contended, *inter alia:* the Act is unconstitutional in that all the provisions which purport to affect intrastate gas exceed the power of Congress to regulate commerce among the several states and abrogate the Tenth Amendment as well as being a denial of equal protection and due process (Count I); the provisions of the Act which "attempt to coerce plaintiffs" into enactment of legislation, assignment of state employees, and the expenditure of state funds for the implementation of federal policy are an invasion of state sovereignty and intergovernmental immunity, violative of the Tenth Amendment guarantees and in excess of Congress' Commerce Clause power (Count II); the provisions of the Act which authorize the allocation and distribution of intrastate gas into interstate pipelines exceed Congress' Commerce Clause power and invade state sovereignty

and immunity as provided in the Tenth Amendment, equal protection, and due process clauses (Count IV).

Intervening plaintiff State of Wyoming raised substantially the same issues. Intervening plaintiff Ralph Harvey attacked the regulation of intrastate gas as exceeding Congress' Commerce Clause power and further alleged that certain pricing provisions of the Act were unconstitutional.

In granting summary judgment in favor of FERC and upholding the constitutionality of the Act in all respects, the trial court found/concluded, *inter alia:* Congress may regulate activities which are wholly intrastate when the intrastate activity either has a substantial economic effect on interstate commerce or where federal regulation of the intrastate activity is necessary to effectuate the interstate regulation; in assessing a challenge to Congress' regulation of intrastate commerce a court must determine whether Congress had a rational basis for determining that the unregulated intrastate gas market affected interstate commerce and, if so, whether the means selected by Congress were reasonably adapted to eliminating the burden; Congress had a rational basis for determining that the unregulated intrastate market imposed a burden on interstate commerce; the regulatory scheme adopted by Congress is reasonably adopted to eliminating the burden on interstate commerce; the enactment of the Act was within the constitutional congressional power; the enactment of the Act was not in violation of the constitutional doctrine of intergovernmental immunity; the States have failed to establish that the implementation of the Act will severely reduce state revenues; the power to regulate natural gas is not a traditional state function from which Congress is prohibited from interfering; Congress may pre-empt state conservation regulations which interfere with or burden interstate commerce; Congress may delegate certain ad-

ministrative duties to administrative agencies, federal or state; the States, while authorized to administer the Act, are not coerced into administering the Act since no sanctions are levied in the event a state agency refuses to act; although the Act does impose both revenue reducing regulations and the cost of their administration upon certain natural gas producing states, there can be no violation of the Tenth Amendment or equal footing doctrine, inasmuch as the Act does not command any State action, and the States are free to refuse to act, thus avoiding payment for administration.

On appeal, States contend: (1) "Congress is without constitutional authority under the Commerce Clause to set maximum prices on natural gas not sold in interstate commerce or in competition with interstate natural gas in any market solely on the ground that such sales *are* wholly intrastate and in order to compel them to *become* interstate"; (2) NGPA's imposition of maximum prices on intrastate sales of natural gas, even if an otherwise valid exercise of Congress' Commerce Clause authority, is prohibited by the constitutional doctrine of intergovernmental immunity; and (3) NGPA unconstitutionally coerces States to implement a federal regulatory program with their own agencies, personnel and resources and to restructure their regulatory agencies and appellate procedures.

I.

States contend that Congress is without constitutional authority under the Commerce Clause to set maximum prices on intrastate gas and that even if such pricing could be considered valid under the Commerce Clause, it is prohibited by the constitutional doctrine of intergovernmental immunity.

In assessing the ability of Congress to set maximum

prices on intrastate natural gas sales, the District Court observed:

> It is now beyond argument that Congress may regulate activities which are wholly intrastate when the intrastate activity either has a substantial economic effect on interstate commerce or where federal regulation of the intrastate activity is necessary to effectuate interstate regulation. See, e.g., *Fry v. United States,* 421 U.S. 542, 95 S.Ct. 1792, 44 L.Ed.2d 363 (1975); *Daniel v. Paul,* 395 U.S. 298, 89 S.Ct. 1697, 23 L.Ed.2d 318 (1969); *Katzenbach v. McClung,* 379 U.S. 294, 85 S.Ct. 377, 13 L.Ed.2d 290 (1964); *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964). Such power includes regulation of prices of intrastate products and activities. *Wickard v. Filburn,* 317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122 (1942); *United States v. Wrightwood Dairy Co.,* 315 U.S. 110, 62 S.Ct. 523, 86 L.Ed. 726 (1942); *Houston, East & West Texas Railway v. United States,* 234 U.S. 342, 34 S.Ct. 833, 58 L.Ed. 341 (1914). This Court's role in assessing the present challenge to Congress' regulation of intrastate commerce is limited to a determination of two factors — whether Congress had a rational basis for determining that the unregulated intrastate gas market affected interstate commerce, and, if so, whether the means selected by Congress were reasonably adapted to eliminating the burden. *Arizona Public Service Co. v. Snead,* 441 U.S. 141, 99 S.Ct. 1629, 60 L.Ed.2d 106 (1979); *Perez v. United States,* 402 U.S. 146, 91 S.Ct. 1357, 28 L.Ed.2d 686 (1972); *Heart of Atlanta Motel, Inc. v. United States,* supra; *Katzenbach v. McClung, supra.* In determining whether a rational basis exists for the finding of burden on

> interstate commerce, the Court may not substitute its judgment for that of Congress, but must look at the legislative history and the acts and testimony before Congress. If "a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce [is found], our investigation is at end." *Katzenbach v. McClung, supra,* 379 U.S. at 303-04, 85 S.Ct. at 383.
>
> 494 F.Supp. at pp. 653-654. [Footnotes omitted].

After finding that Congress did, indeed, have a rational basis for determining that the unregulated intrastate gas market affected interstate commerce and that the means (NGPA) selected by Congress were reasonably adopted to eliminate the burden, the District Court addressed States' contention that the pricing of intrastate gas was violative of the constitutional doctrine of intergovernmental immunity:

> While enactment of the NGPA is within constitutional congressional commerce power, the inquiry is not at an end. In *National League of Cities v. Usery,* 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976), the Supreme Court held that the power to legislate pursuant to the Commerce Clause is limited by the constitutional doctrine of intergovernmental immunity, i.e., Congress may not interfere with state sovereignty, even under the guise of otherwise permissible Commerce Clause power. The test enunciated in *National League of Cities* is whether Congress impinges upon the sovereign power of the "state qua state" in performing essential governmental functions. The Court listed examples of traditional state operations (a typical but not exhaustive list) as fire and

police protection, sanitation, public health, and parks and recreation.

* * *

Secondly, and most importantly, the power to regulate gas produced and sold intrastate is not the type of "traditional state function" from which Congress is prohibited from interfering under *National League of Cities.* It is not the states' roles as providers of roads, education, and similar traditional state functions which is infringed by the Act, but, if anything, their choice of methods by which to fund such functions. The distinction is essential. Under the NGA, the Supreme Court has rejected an argument that impairment of state revenues must be considered. *In Re Permian Basin Area Rate Cases,* 390 U.S. 747, 822, n. 114, 88 S.Ct. 1344, 1389 n. 114, 20 L.Ed.2d 312 (1968); *FPC v. Hope Gas Co.,* 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333 (1944). While the impact on individual state treasuries is a critically important factor for the Congress to consider, the constitutionality of the Act is not necessarily dependent on it. If the financial impact on the functioning of the governmental bodies involved were so severe as to impair the states' ability to function effectively in a federal system, as in *National League of Cities,* then it could be said that the impact and intrusion threatens the states' separate and independent existence. *Coyle v. Oklahoma,* 221 U.S. 559, 31 S.Ct. 688, 55 L.Ed. 853 (1911). Such is not the case here. Federal regulation which has an indirect effect on state treasuries is not the same impermissible intrusion on state sovereignty found in *National League of Cities.* See *Public*

Service Co. v. FERC, 587 F.2d 716 (5th Cir. 1979), cert. denied 444 U.S. 879, 100 S.Ct. 166, 62 L.Ed.2d 108.

494 F.Supp. at pp. 656-657.

We hold that the District Court properly concluded that Congress acted within its powers in enacting legislation to effectuate setting maximum prices on intrastate gas and that such pricing is not prohibited by the doctrine of intergovernmental immunity. In our view, the District Court's analysis in assessing the validity of Congress' enactment of the NGPA vis-a-vis a constitutional challenge predicated on the legal efficacy of the Commerce Clause, closely parallels a similar discussion in *Hodel v. Virginia Surface Mining*, ___ U.S. ___ (Decided June 15, 1981) (49 L.W. 4654). There the constitutionality of the Surface Mining and Reclamation Control Act of 1977[5] was upheld, and the Court observed:

> The task of a court that is asked to determine whether a particular exercise of congressional power is valid under the Commerce Clause is relatively narrow. The court must defer to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such a finding. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964); *Katzenbach v. McClung*, 379 U.S. 294, 303-304 (1964). This established, the only remaining question for judicial inquiry is whether "the means chosen by [Congress] is reasonably adapted to the end permitted by the Constitution." *Heart of Atlanta Motel, Inc. v. United States, supra*, at 262. See *United States v. Darby*, 312 U.S. 100, 121 (1941); *Katzenbach v.*

5. 30 U.S.C.A. §§ 1201 *et seq.* (1976 ed., Supp. III).

McClung, supra, at 304. The judicial task is at an end once the court determines that Congress acted rationally in adopting a particular regulatory scheme. *Ibid.*

Judicial review in this area is influenced above all by the fact that the Commerce Clause is a grant of plenary authority to Congress. See *National League of Cities v. Usery,* 426 U.S., at 840; *Cleveland v. United States,* 329 U.S. 14, 19 (1946); *NLRB v. Jones & Laughlin Steel Corp.,* 301 U.S. 1, 37 (1937). This power is "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." *Gibbons v. Ogden,* 9 Wheat. 1, 196 (1824). Moreover this Court has made clear that the commerce power extends not only to "the use of channels of interstate or foreign commerce" and to "protection of the instrumentalities of interstate commerce . . . or persons or things in commerce," but also to "activities affecting commerce." *Perez v. United States,* 402 U.S. 146, 150 (1971). As we explained in *Fry v. United States,* 421 U.S. 542, 547 (1975), "[e]ven activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States or with foreign nations." See *National League of Cities v. Usery, supra,* at 840, *Heart of Atlanta Motel, Inc. v. United States, supra,* at 255; *Wickard v. Filburn,* 317 U.S. 111, 127-128 (1942); *United States v. Wrightwood Dairy Co.,* 315 U.S. 110, 119 (1942); *United States v. Darby, supra,* at 120-121.

Thus, when Congress has determined that an activity affects interstate commerce, the courts

> need inquire only whether the finding is rational. Here, the District Court properly deferred to Congress' express findings, set out in the Act itself, about the effects of surface coal mining on interstate commerce.
>
> 49 L.W. at pp. 4656-4657.

Here, as in *Hodel v. Virginia*, the District Court properly deferred to the express findings of Congress relative to the effects of the intrastate gas market on interstate commerce. Furthermore, here, as in *Hodel v. Virginia*, the District Court likewise considered "the only remaining question for judicial inquiry", *i.e.*, whether "the means chosen by [Congress] is reasonably adapted to the end permitted by the constitution."

States' burden of establishing that the means selected by Congress was not reasonably adapted to the end permitted by the Constitution is a heavy one which States have failed to meet. In *Hodel v. Indiana*, ___ U.S. ___ (June 15, 1981) (49 L.W. 4667), the Court stated:

> Social and economic legislation like the Surface Mining Act that does not employ suspect classifications or impinge on fundamental rights must be upheld against equal protection attack when the legislative means are rationally related to a legitimate governmental purpose. *Schweiker v. Wilson*, ___ U.S. ___ (1981); *U.S. Railroad Retirement Board v. Fritz*, ___ U.S. ___ (1980). Moreover, such legislation carries with it a presumption of rationality that can only be overcome by a clear showing of arbitrariness and irrationality. *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. at 83; *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. at 15. As the Court explained in *Vance v. Bradley*, 440 U.S. 93, 97 (1979), social and eco-

> nomic legislation is valid unless "the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [a court] can only conclude that the legislature's actions were irrational."
>
> 49 L.W. at p. 4671.

We hold that the District Court properly found/concluded that the enactment of NGPA is a constitutionally acceptable exercise of Congress' Commerce Clause power. We also hold that the District Court correctly found that the maximum pricing provisions of the Act are not prohibited by the constitutional doctrine of intergovernmental immunity. *See National League of Cities v. Usery*, 426 U.S. 833 (1976) at p. 851.

II.

States contend that NGPA unconstitutionally coerces States to implement a federal regulatory program with their own agencies, personnel and resources and to restructure their regulatory agencies and appellate procedures. States argue that NGPA conscripts state agencies to operate a federal program, that NGPA requires producing states to implement the Act, and that enforcement of the Act burdens the states and interferes with their freedom to structure their governments, all in violation of their state sovereignty and the Tenth Amendment.

In addressing these contentions, the District Court observed:

> It is no longer questioned that Congress may delegate certain adjudicatory and legislative duties to an administrative agency. There is no

indication in any authority provided to or found by the Court that this delegation may not properly be made to a state rather than federal administrative agency. The NGPA does not impose the federal appellate process on a state agency determination, as argued by Harvey. Rather, it makes the state agency determination the first step in the federal administrative chain, delegating to the state agency, providing it consents, the duty of making the initial determination under the Act, with review thereafter in the appropriate federal forum.

Congress has not exceeded the limitation of the Tenth Amendment and the doctrine of intergovernmental immunity in delegating the initial price determination to state agencies. The test, as discussed above, is whether the challenged legislation directly displaces "the States' freedom to structure integral operations in areas of traditional governmental functions." *National League of Cities v. Usery, supra,* 426 U.S. at 852, 96 S.Ct. at 2474.

* * *

The states argue that they are coerced into administering the Act, spending state funds for the operation of a federal program on behalf of a federal agency. This is contended to be an impermissible intrusion into traditional state functions. *National League of Cities v. Usery, supra.* Defendants respond simply that the states are not coerced to act and that therefore the admininstrative scheme is constitutional.

The distinction between "coercion" and "permission" is supported in a long line of precedent which holds that the federal government

> may delegate implementation of federal programs to states willing to comply. These cases arise for the most part from legislation conditioning the grant of federal funds upon the state's compliance with some federal program. Rejection of state sovereignty arguments is on the theory that the state has "the 'simple expedient' of not yielding to what she urges is federal coercion."
>
> 494 F.Supp. at pp. 659, 660-661.

A similar standard was set forth by the Supreme Court in *Hodel v. Virginia, supra,* wherein the Court, in assessing a Tenth Amendment challenge to the Surface Mining Control and Reclamation Act of 1977, opined:

> It should be apparent from this discussion that in order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy *each* of three requirements. First, there must be a showing that the challenged statute regulates the "States as States." *Id.,* at 854. Second, the federal regulation must address matters that are indisputably "attributes of state sovereignty." *Id.,* at 845. And third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional functions." *Id.,* at 852. When the Surface Mining Act is examined in light of these principles, it is clear that appellees' Tenth Amendment challenge must fail because the first of the three requirements is not satisfied.
>
> * * *

If a State does not wish to submit a proposed permanent program that complies with the Act and implementing regulations, the full regulatory burden will be borne by the Federal Government. Thus, there can be no suggestion that the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program. . . . The most that can be said is that the Surface Mining Act establishes a program of cooperative federalism that allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs.

* * *

Appellees argue, however, that the threat of federal usurpation of their regulatory roles coerces the States into enforcing the Surface Mining Act. Appellees also contend that the Act directly regulates the States as States because it establishes mandatory minimum federal standards. In essence, appellees urge us to join the District Court in looking beyond the activities actually regulated by the Act to its conceivable effects on the States' freedom to make decisions in areas of "integral governmental functions." And appellees emphasize, as did the court below, that the Act interferes with the States' ability to exercise their police powers by regulating land use.

Appellees' claims accurately characterize the Act insofar as it prescribes federal minimum standards governing surface coal mining, which a State may either implement itself or else yield to a federally administered regulatory program.

> To object to this scheme, however, appellees must assume that the Tenth Amendment limits congressional power to pre-empt or displace state regulation of private activities affecting interstate commerce. This assumption is incorrect.
>
> A wealth of precedent attests to congressional authority to displace or pre-empt state laws regulating private activity affecting interstate commerce when these laws conflict with federal law.
>
> 49 L.W. at p. 4660. [Footnote omitted].

As in *Hodel v. Virginia*, the NGPA simply allows the states to participate in the administration of the Act. There, as here, "[i]f a State does not wish to submit a proposed permanent program . . . , the full regulatory burden will be borne by the Federal Government." In view of the right of Congress to displace or pre-empt state laws regulating private activity affecting interstate commerce when they conflict with federal laws, we hold that the District Court correctly found that the Act is not in violation or degradation of States' Tenth Amendment right.

We commend the District Court for an excellent Memorandum Opinion. *See* 494 F.Supp. 636.

WE AFFIRM.

APPENDIX

B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

THE STATE OF OKLAHOMA, by and through LARRY DERRYBERRY, ATTORNEY GENERAL OF THE STATE OF OKLAHOMA; DAVID L. BOREN, GOVERNOR OF THE STATE OF OKLAHOMA; THE STATE OF TEXAS, by and through JOHN L. HILL, ATTORNEY GENERAL OF THE STATE OF TEXAS; DOLPH BRISCOE, GOVERNOR OF THE STATE OF TEXAS; THE STATE OF LOUISIANA, by and through WILLIAM J. GUSTE, JR., ATTORNEY GENERAL OF THE STATE OF LOUISIANA; EDWIN EDWARDS, GOVERNOR OF THE STATE OF LOUISIANA; SHIRLEY McNAMARA, SECRETARY OF THE LOUISIANA DEPARTMENT OF REVENUE AND TAXATION; and WILLIAM C. HULS, SECRETARY OF THE LOUISIANA DEPARTMENT OF NATURAL RESOURCES,

Plaintiffs

JUNE 4, 1980

THE STATE OF WYOMING, by and through its Attorney General; RALPH L. HARVEY, individually and as president of Marlin Oil Corporation,

Intervening Plaintiffs

vs.

FEDERAL ENERGY REGULATORY COMMISSION,

Defendant

UNITED STATES OF AMERICA,

Intervening Defendant

MEMORANDUM OPINION

The Natural Gas Policy Act of 1978[1] was signed into law on November 9, 1978, along with four other bills, as part of a comprehensive energy program. Broadly characterized, the Natural Gas Policy Act (hereafter NGPA or the Act) is intended to encourage production by providing price incentives for the exploration and production of new gas sources, with eventual deregulation of certain wells, while facilitating interstate transportation and supply. The NGPA represents the first federal regulation of wholly intrastate gas.

Oklahoma, Louisiana, and Texas challenge the NGPA as unconstitutional, alleging, in their complaint as amended and supplemented (hereafter amended complaint) that all provisions thereof which purport to affect intrastate gas (§§2, 101-103, 105-109, 121, 122, 201-206, 301-304, 311-315, 504, and 602) exceed the power of

1. 15 U.S.C. §§3301, et seq.

Congress to regulate "commerce among the several states," and abrogate the Tenth Amendment, as well as being a denial of equal protection and due process (count I). Plaintiff States allege that the provisions of the Act which "attempt to coerce plaintiffs" into enactment of legislation, assignment of state employees, and expenditure of state funds for the purpose of implementing federal policy (§§304, 312, 501, 503-506) are an invasion of state sovereignty and intergovernmental immunity, a violation of the constitutional guaranty of a republican form of government, a denial of equal protection, due process, and Tenth Amendment guarantees, and in excess of Congress' commerce clause power (count II). The states of Texas and Oklahoma further allege that federal regulation of natural gas produced from the public lands within those states violates the terms of their admission into the Union (count III)[2]. Count IV of plaintiffs' amended complaint alleges that all provisions of the Act which authorize the allocation and distribution of intrastate gas into interstate pipelines (§§201-206, 301-304, 311-315, 504) exceed Congress' commerce clause power, and invade state sovereignty and immunity, as provided in the Tenth Amendment, equal protection, and due process clauses. Plaintiffs pray for a declaratory judgment that the named provisions of the Act are unconstitutional.

The complaint in intervention of intervening plaintiff Wyoming raises substantially the same issues.[3] Inter-

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2. Oklahoma has apparently abandoned its allegation in this respect. See note 13, infra.

3. New Mexico was permitted to intervene but dismissed its complaint prior to the filing of responsive pleading by defendant. Rule 15(a), Federal Rules of Civil Procedure.

vening plaintiff Ralph Harvey, individually and as president of Marlin Oil Corporation, also attacks the regulation of intrast e gas as exceeding Congress' commerce clause power. Additionally, Harvey asserts that certain subjections of §102 which provide price ceilings for certain categories of gas lack any rational basis and are violative of due process. Harvey alleges that §106(b) arbitrarily discriminates against individuals in favor of states and Indian tribes, in violation of equal protection and due process guarantees, and that the bifurcated system of administrative review of price determination provided in §503, i.e., initial determination in the appropriate state agency with review in the Federal Energy Regulatory Commission and the United States Courts of Appeals, violates state sovereignty and the Tenth Amendment. Harvey prays that the referenced sections be declared unconstitutional.

Defendant Federal Energy Regulatory Commission (FERC) and intervening defendant United States (hereafter defendants) have answered, asserting certain defenses and denying plaintiffs' claims.

Pursuant to agreement of counsel at pretrial conference, simultaneous motions were filed by all parties. Defendants have moved to dismiss the claims of plaintiffs with respect to certain sections of the Act, asserting that those claims are either not ripe for review or are not properly before this Court. Defendants have further moved to dismiss the claims of intervening plaintiff Harvey (with the exception of his claim that the regulation of intrastate gas exceeds Congress' commerce power), alleging that he has no standing to raise the issues in his complaint. Defendants have moved for summary judgment on the remaining claims of plaintiffs. Plaintiff States, joined by intervening plaintiff Wyoming (hereafter plaintiff and intervening plaintiff States will be referred to as plaintiffs) have moved for summary judgment on their amended complaint, and

Harvey has moved for summary judgment on his complaint in intervention. Responses to the motions have been filed by adverse parties. Amicus briefs have been received from the Washington Legal Foundation and from David Engdahl. Oral arguments on the motions were had, the issues have been exhaustively briefed and the Court herein renders its opinion on all pending motions.

The Act

Brief summaries of both the Natural Gas Policy Act and prior controls over the natural gas industry will perhaps be helpful at the outset.

In 1938, the Natural Gas Act (NGA)[4] was enacted by Congress, regulating the transportation and sale of natural gas in interstate commerce. The NGA left certain matters involving natural gas production and sale unregulated, particularly gas produced, sold, and consumed within a state. The Federal Power Commission[5] regulated many aspects of interstate gas, including pricing following the decision of the Supreme Court in *Phillips Petroleum Co. v. Wisconsin,* 347 U.S. 672 (1954). As part of the regulatory scheme, once gas had been dedicated to the interstate market, it could not be withdrawn without FPC approval. Wholly intrastate gas was not subject to FPC price regulation and the price of such gas has not been regulated in any of the plaintiff States, resulting generally in higher prices of intrastate gas. The plaintiff States assert that the unregulated intrastate market is highly advantageous to the interstate market, as higher intrastate prices encourage new

4. 15 U.S.C. §§717, et seq.

5. The FPC is now Federal Energy Regulatory Commission, under the Department of Energy Organization Act, 42 U.S.C. §§7101, 7134.

production and development, creating a surplus which is diverted into the interstate market once intrastate demand is met, and further discouraging wasteful consumption. Defendants assert, and the legislative history of the NGPA recites,[6] that unregulated intrastate prices have resulted in shortages of natural gas in nonproducing states, as the intrastate market, with its higher price advantage, is able to secure the lion's share of new gas production. The NGPA was Congress' solution to the necessity of encouraging production and exploration of new natural gas sources and maintaining adequate supplies of natural gas in the interstate market.[7]

Title I of the Act establishes price ceilings for all first sales of natural gas without regard to its interstate or intrastate character. These prices are by reference to a base period, with adjustment monthly for inflation and, in some cases, for real growth. Section 102 sets maximum rates for newly discovered gas which meets certain qualifications; §103 sets rates for new, onshore production wells; §104(b)(1) defines ceiling rates for

* * *

allocate gas for high priority use. Any emergency purchase or allocation order issued by the President preempts any state or local provision in conflict.

Title IIIB authorizes certain sales between interstate and intrastate pipelines and empowers FERC to impose certain requirements on contracts. Section 311 allows FERC to authorize transportation of natural gas by an interstate pipeline on behalf of any intrastate pipeline

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6. See discussion p. 25, infra.

7. S. Rep. No. 95-436, 95th Cong., 2d. Sess. 10, reprinted in (1978) U.S. Code Cong. & Ad. News 7858-59, H.R. Rep. No. 95-496 Part IV, 95th Cong., 2d Sess. 96-97, reprinted in (1978) U.S. Code Cong. & Ad. New 8540-41.

and vice versa, requiring rates that are just and reasonable as to transportation by interstate pipelines, fair and equitable as to transportation by intrastate pipelines. FERC may also authorize sales by intrastate pipelines to interstate pipelines, at a fair and equitable price, a formula for which is provided in §311(b)(2). The duration of sales under this section is limited to two years, with two-year extensions if approved by FERC. Sales authorized under §311 are subject to interruption by the seller or termination by FERC, with procedural requirements for both situations defined. Section 312 empowers FERC to allow the assignment by an intrastate to an interstate pipeline of its right to receive surplus natural gas. Determination of surplus is made by the appropriate state agency. Section 313 limits the effect of prices paid for high cost gas in certain emergency purchases in the application of indefinite price escalator clauses, defined in §105(b). Section 314 makes unenforceable any contract provisions which prohibit commingling of contractual gas with gas subject to the NGA, prohibits sale to or transportation by an interstate pipeline or otherwise prohibits sale or transportation in interstate commerce, or terminates or grants an option to terminate contractual obligations as a result of commingling, sale or transportation. Section 315 allows FERC to establish minimum periods of duration of producer contracts for sale of natural gas, not to exceed the shorter of 15 years or the commercially producable life of the reservoir. FERC is required to exercise its authority so as not to discriminate between interstate and intrastate pipelines, and is precluded from giving advantage to an interstate pipeline which would have the effect of denying adequate supplies to intrastate pipeline systems. FERC is also required under this section to provide a right of first refusal for certain categories of natural gas production, and is authorized to require purchasers to file copies of all new contracts with FERC. Certain sections in Title IIIB, by reference to §601 of the Act, clarify that the jurisdiction of FERC under the NGA

does not extend to intrastate pipelines by virtue of sales or transportation of interstate gas under the Act.

Title IV is not attacked by plaintiffs and will not be summarized here.

Title V sets out procedures for administration, enforcement, and review. Section 501 provides that FERC shall administer the Act, except as provided otherwise in the Act. FERC is given authority to make rules and define terms, and may delegate its authority with respect to certain sections to the appropriate state agency, with the consent of that agency. Section 502 sets out the procedure for issuing rules or orders under the Act. Under §503, a producer must obtain a determination of eligibility before getting the higher prices provided in Title I. The federal or state agency having regulatory jurisdiction over the production of natural gas is authorized to make such determinations, but may waive its authority by obtaining a written agreement with FERC, setting out the terms and conditions applicable to the waiver. Review of the decision of the state or federal agency is in FERC, which is to affirm if the decision is supported by substantial evidence. FERC may also remand the matter to the state or federal agency, and any adversely affected party may appeal FERC's final findings to the United States Court of Appeals of the appropriate circuit. Any sales of natural gas pending determination under this section are subject to refund with interest if the maximum price is determined to be lower than that charged. Section 504 provides civil and criminal enforcement procedures for sales in excess of the maximum prices provided in the Act. Section 505 empowers the Secretary of Energy to intervene as a matter of right in any state agency proceeding relating to limitations on natural gas production. Sections 506 and 507 provide the procedure for judicial and congressional review, respectively.

Title VI defines the application of the NGA, and the jurisdiction of FERC under the NGA.

Defendants' Motion to Dismiss

Plaintiffs States' complaints are largely directed to the existence and extent of congressional power to regulate wholly intrastate sales of natural gas. While plaintiffs' complaints specify the sections of the Act to which these arguments are directed, their briefs on the pending motions make only passing reference to the individual sections, and concentrate instead on the general question presented, i.e., Congress' power to impose *any* regulation on wholly intrastate sales. Defendants, on the other hand, have moved to dismiss certain of plaintiffs' claims, asserting that as to some of the sections attacked by plaintiffs, no justiciable case or controversy is presented. Specifically, defendants assert that plaintiffs' claims with respect to §§121, 201-206, 301-304, 311, 312, 315, and 505 should be dismissed. As to §§121, 301-304, and 505, defendants argue that plaintiffs' claims are purely speculative and hypothetical, as the contingencies upon which these sections may be activated have not yet occurred. Defendants argue that §§201-206, 311, 312, and 315 simply specify guidelines for the issuance of rules or orders by FERC. Until these rules or orders are promulgated, plaintiffs' claims are not ripe, defendants argue, and furthermore, review of such rules and orders is properly in the Court of Appeals, as provided in §506(b).

Although plaintiffs' complaint lists the sections of the NGPA which plaintiffs believe to be unconstitutional, plaintiffs' amended complaint is primarily a broad-based attack on the constitutionality of the Act under the Commerce Clause. In this context, plaintiffs' claims are neither speculative nor premature. There is instead a very specific and concrete question presented by plaintiffs' complaint, i.e., the power of Congress to regulate

wholly intrastate gas. Plaintiffs are presently aggrieved by the operation of the Act and, therefore, the constitutional issues are ripe for decision. See *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 81-82 (1978); *United Public Workers v. Mitchell*, 330 U.S. 75, 89 (1947).

As to defendants' contention that those sections which merely authorize or direct FERC to enact rules are not ripe for review, it is Congress' commerce clause power which is at issue in this case, and whether Congress itself enacts controls over intrastate gas or delegates the responsibility to do so to FERC, the issue is clearly delineated and concrete. Plaintiffs do not allege that regulations promulgated under the Act do them specific harm, or are procedurally inadequate, but rather allege that Congress may not interfere with wholly intrastate activities, referring to specific sections of the Act only to clarify which portions they deem to be unconstitutional interference. In this context, the amended complaint of plaintiffs presents a case or controversy, ripe for consideration. Likewise, the claims as to these sections are not properly before the Court of Appeals, under §506, because it is not judicial review of rules or orders of FERC which plaintiffs here seek, but rather a judicial determination of the extent of Congress' power to delegate to FERC any control over intrastate commerce. Defendants' motion to dismiss portions of the amended complaint and complaint in intervention of the plaintiff States must therefore be denied.

Plaintiff-Intervenor Harvey

Defendants have moved to dismiss portions of the complaint in intervention of plaintiff-intervenor Ralph Harvey, individually and as president of Marlin Oil Corporation (hereafter Harvey), on the ground that Harvey lacks standing to litigate the issues raised. Specifically, defendants allege that Harvey lacks standing to litigate

those issues in paragraphs 5 through 7 of his complaint. Briefly summarized, Harvey's allegations are (1) that the statutory price classifications of various categories of natural gas, found in §§102(c)(1)(B), 102(b)(2), and 121(a)(2 and 3) of the Act, have no rational basis and are a violation of the due process clause. (Complaint in Intervention, ¶5); (2) the maximum prices in §106(b) of the Act for intrastate sales of "rollover contract" gas arbitrarily discriminate between sales by individuals and sales by state governments and Indian tribes, a violation of the due process and equal protection clauses; (Complaint in Intervention, ¶6); and, (3) the bifurcated system of pricing determination, under §503 of the Act, requires a state regulatory agency to make the initial determination, with review in the federal regulatory agency and the United States Courts of Appeals. This is alleged to be an invasion of state sovereignty in violation of the Tenth Amendment (Complaint in Intervention, ¶7).[8] In support of his standing to raise these issues, Harvey's complaint alleges, at paragraph 3, that he is an Oklahoma citizen selling natural gas in intrastate commerce and that Marlin Oil Corporation is engaged in natural gas exploration and production, as well as in intrastate sales of gas. Defendants contend, in their motion to dismiss and for summary judgment, that Harvey must allege facts demonstrating his standing and that he has not done so, requiring dismissal.

The test applied to determine standing has been both stated and applied in a variety of ways. The most widely quoted definition of the principle of standing is found in *Baker v. Carr*, 369 U.S. 186, 204:

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8. Harvey additionally alleges, in paragraph 4 of the complaint in intervention, that Congress' attempt to regulate entirely intrastate sales is beyond Congress' lawful power under the Commerce Clause. Defendants do not question Harvey's standing to assert this issue.

> "Have the [parties] alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions? This is the gist of the question of standing. It is, of course, a question of federal law."

Standing has been demonstrated by a showing of injury in fact, economic or otherwise, *Data Processing Service Organizations v. Camp,* 397 U.S. 150 (1970); *Barlow v. Collins,* 397 U.S. 159 (1970); legally cognizable injury suffered by the party asserting it, *Baker v. Carr, supra*; direct and concrete injury, *United States v. Richardson,* 418 U.S. 166 (1974); *Schlesinger v. Reservist's Committee to Stop The War,* 418 U.S. 208 (1974); specific present objective harm or specific future harm, *Laird v. Tatum,* 408 U.S. 1 (1972); and personal profit, *Simon v. Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26 (1976). The conceptual principles of standing appear to be elastic and, in large part, dependent upon the type of claim alleged and remedy sought. In this instance, it is apparent that Harvey stands in a position to suffer injury in fact, under any of the various characterizations thereof, from the challenged Act. As evidenced by his affidavit in support of brief in opposition to defendants' motion to dismiss, Harvey has some nineteen wells affected by the pricing provisions of §102(c)(1)(B), et al., and the price determination procedure required by §503. Although Harvey has not yet gone beyond the state regulatory stage of price determination, the Court is satisfied that he has shown a real threat of specific future harm, by virtue of his pending applications before the state agency, which entitles him to test the constitutionality of the state-federal appellate process. The economic injury resulting from the price classification has also been established. While Harvey's complaint in intervention is perhaps too generally phrased to allow

such factual conclusions, the complaint is sufficient, absent challenge, to support standing, and once standing is challenged, the Court may search the record to make its determination of the issue. *Aiken v. Obledo,* 442 F.Supp. 628 (E.D. Cal. 1977). Harvey's complaint in intervention, the briefs in support of intervention, and the affidavit in support of Harvey's brief in opposition to defendants' motion to dismiss are sufficient to establish standing on Harvey's first and third claims, as described above. Harvey has made no factual allegations supporting his right to challenge the rollover contract price distinctions between individuals and states or Indian tribes. Harvey instead argues that standing is to be determined by focusing on the parties, rather than the merits of their claims, concluding that standing does not have to be shown as to each issue raised. Harvey's standing to raise issues which do not directly affect him is not a constitutional limitation of this Court's power, but a question of the prudential limits on the exercise of jurisdiction. In *Duke Power Co. v. Carolina Environmental Study Group,* 438 U.S. 59 (1978), the court acknowledged the reasons for imposition of prudential limits on standing when a party who has standing as to some issues seeks also to assert the rights of others. The court added, at pp. 80-81:

> "Where a party champions his own rights, and where the injury alleged is a concrete and particularized one which will be prevented or redressed by the relief requested, the basic practical and prudential concerns underlying the standing doctrine are generally satisfied when the constitutional requisites are met."

In the present case, Harvey has established his constitutional standing to litigate three of his four claims. Moreover, it appears from the number of his wells affected by the pricing provisions of Title I that Harvey will eventually be affected by the rollover contract

prices in §106, and he has thus alleged enough to bring him within the zone of protectable interests as to this claim. The injury alleged in this claim is particularized, may be remedied by the relief requested, and is therefore properly before the Court under the standards quoted above. The Court therefore holds that plaintiff-intervenor Harvey has standing to litigate the issues raised in his complaint in intervention, and overrules defendants' motion to dismiss the complaint in intervention on this ground.

Harvey's Motion for Summary Judgment

Having ruled that plaintiff-intervenor Harvey has standing to raise the issues contained in his complaint in intervention, the Court next addresses those issues.[9]

Section 102

Harvey attacks the statutory price classifications of categories of natural gas found in §102 of the Act. Under §102, new natural gas is that produced from a new well at least 2½ miles from the nearest marker well or produced from at least 1,000 feet deeper than the deepest production of each marker well within 2½ miles. New gas qualifies for special incentive prices. Gas produced from new wells within these limitations may also qualify if it is shown to be from a new reservoir.

Harvey contends that the new gas pricing provision violates due process, as there is no rational basis for the

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9. Although defendants, in their argument that Harvey lacks standing, request an opportunity to submit a brief on these issues should the merits be reached (brief in support of defendants' motion to dismiss and for summary judgment, p. 38, n. 43), defendants subsequently addressed the merits of plaintiff-intervenor's claims (brief in opposition to plaintiff's motion for summary judgment, pp. 23-30), and the Court considers plaintiff-intervenor's motion for summary judgment to be at issue.

2½ mile and 1,000 feet figures found in §102. Harvey admits that Congress may have a right to create such categories, but argues that the means employed are arbitrary, having no relation to the object of Congress. Harvey further argues that the 2½ mile and 1,000 foot depth classifications create irrebuttable presumptions, and are thus violative of due process.

The Fifth Amendment prohibits arbitrary legislation, *Nebbia v. New York,* 291 U.S. 502 (1927), and requires that the means selected by Congress have a real and a substantial relation to a permissible legislative objective. If the goals sought by federal legislation are legitimate, and the classification adopted is rationally related to the achievement of those goals, then the legislation is not so arbitrary as to violate due process entitlements. *Richardson v. Belcher,* 404 U.S. 78 (1971). Harvey admits, and it is historically established, that encouragement of production of natural resources is a permissible legislative objective. *Mobil Oil Corp. v. FPC,* 417 U.S. 283 (1974). The remaining inquiry is thus whether the 2½ mile and 1,000 foot depth classifications are rationally related to the goal of encouragement of gas production. Harvey argues only that these classifications are not logical, in that there is no basis in petroleum geology, economics or engineering for the imposition of such limits. As a matter of law, the classifications adopted by Congress do not have to be the only alternative, or even the best alternative to be constitutional. *Bell v. Wolfish,* 441 U.S. 520 (1979). Harshness and oppressiveness to particular economic interests will not constitutionally invalidate legislation. *Wickard v. Filburn,* 317 U.S. 111 (1942). Harvey may well have a legitimate argument that the classifications are not what they should be in a practical sense. But Congress has rather wide latitude to make such decisions and still be within its constitutional authority. At issue here is not the wisdom or practicality of Congress' chosen classifications, but whether as a matter of constitutional law they are impermissibly ar-

bitrary, irrational or discriminatory. However debatable, the 2½ mile and 1,000 foot depth classifications in §102 are not unreasonable per se. The classifications further legitimate congressional objectives in providing incentives for the production of new gas as well as ease of administration of the Act.[10] Harvey has the burden of demonstrating that Congress has acted in an arbitrary and irrational way, *Usury v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), and he has done no more than complain of the categories selected by Congress, without showing that their selection is arbitrary or works in a discriminatory manner.

The rational basis of the classifications imposed by Congress must be considered in light of Harvey's second argument on this point — that the classification creates an irrebuttable presumption that gas produced within these limits is "old" gas. The contrary is true. Congress created a presumption that gas produced *outside these limits* is "new gas". Gas produced within the 2½ mile or 1,000 foot limits may qualify for new gas pricing if it can be shown that the gas comes from a new reservoir and is, in fact, new gas. See §102(c)(1)(C). In other words, Congress created a pricing system whereby administrative determinations of old and new gas would be facilitated. Only the production within 2½ miles of marker wells or within 1,000 feet of producing formations need be examined by the appropriate authority. The Court therefore concludes that §102 of the Act, and its provisions regarding old and new gas are not, in a constitutional

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10. Considerations of feasability and practicality are legitimate concerns in regulating natural gas prices. *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968). This factor was considered by Congress. See, e.g., National Energy Act: Hearings on H.R. 6831 before the Subcomm. on Energy and Power of the House Comm. on Interstate and Foreign Commerce, 95th Cong., 1st Sess. (1977) at 231 (Comments of James A. Schleisinger, Ass't to Pres.)

sense, arbitrary, nor do they create irrebuttable presumptions, so as to violate the due process clause of the Fifth Amendment. Intervening plaintiff's motion for summary judgment in this respect is denied. Defendants are entitled to judgment on this issue.[11]

Section 106

Harvey next objects to the price ceilings on rollover contracts under §106. A rollover contract is one entered into after the effective date of the Act that replaces an original contract whose primary term has expired. Section 106(b) allows a higher price in connection with rollover contracts for production from state or Indian lands than is available to private owners. Harvey argues that this section discriminates against private producers in favor of states and Indian tribes, in violation of the due process clause of the Fifth Amendment. Harvey contends that the state-Indian exception has no fair and substantial relation to the purposes of the Act, as the encouragement of gas production and prevention of windfall profits are not encouraged, but rather circumvented, by allowing higher prices to states and Indian tribes, entities which, Harvey concludes, are traditionally passive royalty owners with no interest in exploration reinvestment, and no risk in their investments.

The Fifth Amendment has been construed to forbid discrimination by the federal government, as is prohibited by states by the equal protection clause of the Fourteenth Amendment. *Weinberger v. Wiesenfield,* 420

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11. Although defendants have not formally moved for summary judgment against Harvey, having chosen instead to move to dismiss on the grounds that Harvey lacks standing, all parties have asserted that there are no issues of fact present in this case and that the issues are solely ones of law for the Court. Under the circumstances of this case, granting judgment in favor of a non-moving party is appropriate.

U.S. 636 (1975). It is a fundamental standard under the Equal Protection Clause that a law (or classifications made by it) is not unconstitutional because it is imperfect, or even because it lacks logic or scientific justification. If the classifications have some reasonable basis, the Constitution is not offended because in practice it results in some inequality. See *Dandridge v. Williams,* 397 U.S. 471, 485 (1970) and cases cited therein. Defendants argue that the public interest is served by permitting higher prices for states and Indian tribes, supporting this argument by referring to the affidavits submitted by the plaintiff States in support of their separate motion for summary judgment, affidavits which attest to the amount and purposes of state revenue derived from gas production. The public monies derived from gas production on state-owned lands clearly benefit the states and their citizens, and this consideration is a legitimate interest of Congress. Likewise, Indian tribes are sovereigns, *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978), and the revenue derived from gas production, benefiting the tribes and their individual members, is a legitimate interest to be protected. Harvey has made no showing that the Congressional purpose is not a legitimate one, in promoting the revenues accruing to producing states and their citizens, or tribes and their members, nor has he shown that §106 is not rationally related to the purpose. Harvey's motion for summary judgment on this point is therefore overruled, and defendants are entitled to judgment on this claim of intervenor's complaint.[12]

Texas' Admission

Texas claims that federal regulation of gas produced from her public lands is contrary to the terms of her admission into the Union, and is thus violative of the

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12. See footnote 11, supra.

Tenth Amendment.[13] Texas bases her claim on the unique pre-admission history of the Republic of Texas. The joint resolution of Congress which offered the terms of admission reads as follows:

> "*Resolved, by the Senate and House of Representatives of the United States of America in Congress assembled,* That Congress doth consent that the territory properly included within, and rightly belonging to the Republic of Texas, may be erected into a new State, to be called the State of Texas, with a republic form of government, to be adopted by the people of said Republic, by deputies in convention assembled, with the consent of the existing government, in order that the same may be admitted as one of the States of this Union.
>
> 1. ***
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> 2. *And be it further resolved,* That the foregoing consent of Congress is given upon the following conditions, and with the following guarantees, to wit: . . . *Second.* Said State, when admitted into the Union, after ceding to the United States all public edifices, fortifications, barracks, ports and harbors, navy and navy-yards, docks, magazines, arms, armaments, and all other property and means pertaining to the public defence belonging to the said Republic of Texas, shall retain all the public funds, debts, taxes, and dues of every kind, which may belong to or be due and owing said Republic;

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13. Although Oklahoma asserted a similar allegation in the amended complaint, her argument in this respect has apparently been abandoned, as there is no further mention of Oklahoma's admission in the briefs or elsewhere. The Court therefore treats this issue as it relates to Texas only.

> *and shall also retain all the vacant and unappropriated lands lying within its limits,* to be applied to the payment of the debts and liabilities of said Republic of Texas, *and the residue of said lands, after discharging said debts and liabilities, to be disposed of as said State may direct;* but in no event are said debts and liabilities to become a charge upon the government of the United States. . . .
>
> 3. *And be it further resolved,* That if the President of the United States shall, in his judgment and discretion, deem it most advisable, instead of proceeding to submit the foregoing resolution to the Republic of Texas, as an overture on the part of the United States for admission, to negotiate with that Republic; then,
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> *Be it resolved,* That a State, to be formed out *of the present Republic of Texas, . . . shall be admitted into the union, by virtue of this act, on an equal footing with the existing States, . . .*" [Emphasis added].

The first alternative, i.e., §§1 and 2 of the joint resolution, was implemented. Texas argues that by virtue of its retention of its public lands, Congress may not regulate or abridge Texas' power to contract with respect to natural gas produced from those public lands. This issue has been discussed in a different context in *United States v. Texas,* 339 U.S. 707 (1950). There, Texas denied the claim of the United States to ownership of the submerged lands off her coast, arguing that Texas had owned the submerged lands prior to entry and did not surrender them upon annexation to the United States. The Supreme Court held that Texas had been admitted on an equal footing with every other state and that equal footing negatived "any implied, special limitation of any of the paramount powers of the United States in

favor of a State." *Id.*, at 717. Texas responds to the apparent authority of *United States v. Texas, supra*, by asserting that "[t]he court's use of the 'equal footing' language was unfortunate, and worse, was erroneous."[14] Texas bases its argument on the dissent, which noted that equal footing had previously encompassed only political rights, or those rights considered necessary attributes of state sovereignty. Texas also notes that the parties in *United States v. Texas, supra*, had not briefed the equal footing issue, concluding that they "must have felt that the 'equal footing' language of section 3 of the joint resolution was indeed part of an *alternative* mode of annexation and not one of the terms of the annexation agreement."[15] This statement embodies an argument implicit throughout Texas' briefs on this issue — that because §3 of the joint resolution was not implemented, Texas was therefore not admitted "on an equal footing with the existing states," but instead retained her lands, not subject to the supreme constitutional authority of the United States. Texas' argument must fail. The joint resolution which actually admitted Texas into the Union (passed subsequent to Texas' approval of the first joint resolution, quoted above, which offered the terms of admission), expressly declared that Texas is "admitted into the Union on an equal footing with the original States in all respects whatever." 9 Stat. 108 (Dec. 29, 1845); see also *United States v. Texas, supra*, at 713. That Texas must exist on an equal footing with other states cannot be disputed; nor can the clear pronouncement of the Supreme Court as to the effect of the equal footing doctrine be ignored:

> "The 'equal footing' clause prevents extension of the sovereignty of a State into a domain of

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14. Brief in opposition to defendants' motion to dismiss and for summary judgment, p. 25.

15. *Id.*, p. 26.

> political and sovereign power of the United States from which the other states have been excluded, just as it prevents a contraction of sovereignty [citation omitted] which would produce inequality among the States." *United States v. Texas, supra,* at 719-20.

In any event, the NGPA does not conflict with Texas' retention over her public lands, as provided in the joint resolution offering admission. No ownership or control over ownership is being exerted over land by virtue of the Act. Rather, the paramount power of Congress to regulate interstate commerce simply overrides Texas' internal policy decisions concerning natural resources produced from that land. In sum, the Court holds that Texas' admission to the United States was on an equal footing with all other states, and Texas is thus subject to the paramount power of Congress to regulate interstate commerce. Moreover, the particular regulations of the NGPA do not interfere with Texas' ownership of her public lands in a constitutionally impermissible manner. Plaintiff's motion for summary judgment on this issue is therefore overruled, and the motion for summary judgment of defendants on this issue is granted.

Regulation of Intrastate Gas

Congressional power to impose price controls upon and otherwise regulate wholly intrastate gas is the primary issue in this case. All plaintiffs and intervenors have alleged that the NGPA exceeds the power of Congress to regulate interstate commerce,[16] and have further alleged that the method of regulation adopted by

16. In the amicus brief of David Engdahl, an energetic plea is made for the correct analysis of this case as arising under the Necessary and Proper Clause, rather than the Commerce Clause. Article I, §8 gives Congress the power to "regulate commerce . . . among the several states," and to "make all laws which shall be necessary and proper for carrying into execution the foregoing powers." While the

(footnote continued on following page)

Congress interferes with the states' traditional functions and is therefore impermissible by virtue of the Tenth Amendment.

It is now beyond argument that Congress may regulate activities which are wholly intrastate when the intrastate activity either has a substantial economic effect on interstate commerce or where federal regulation of the intrastate activity is necessary to effectuate interstate regulation. See, e.g., *Fry v. United States*, 421 U.S. 542 (1975); *Daniel v. Paul*, 395 U.S. 298 (1969); *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964). Such power includes regulation of prices of intrastate products and activities. *Wickard v. Filburn*, 317 U.S. 111 (1942); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110 (1942); *Houston, East & West Texas Railway v. United States*, 234 U.S. 342 (1914). This Court's role in assessing the present challenge to Congress' regulation of intrastate commerce is limited to a determination of two factors — whether Congress had a rational basis for determining that the unregulated intrastate gas market affected interstate commerce, and, if so, whether the means selected by Congress were reasonably adapted to eliminating the burden. *Arizona Public Service Co. v. Snead*, 441 U.S. 141, (1979); *Perez v. United States*, 402 U.S. 146 (1972); *Heart of Atlanta Motel, Inc. v. United States, supra; Katzenbach v. McClung, supra.*[17] In deter-

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power to regulate intrastate commerce is derived from the Necessary and Proper Clause, as it relates to the Commerce Clause, once this analysis has been made, further pursuit of the semantic distinction serves no purpose. In practical terms, the end result is the same and in keeping with most of the cases relied on in this opinion, the Court refers throughout to the Commerce Clause, rather than to the Commerce Clause as aided by the Necessary and Proper Clause.

17. Plaintiffs conclude that a third analysis is necessary — whether the regulation imposed is the least restrictive alternative. Those cases cited by plaintiffs do not impose this requirement, but rather discuss the burdensomeness of regulation as a factor to be consid-

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mining whether a rational basis exists for the finding of burden on interstate commerce, the Court may not substitute its judgment for that of Congress, but must look at the legislative history and the acts and testimony before Congress.[18] If "a rational basis for finding a chosen regulatory scheme necessary for the protection of commerce [is found], our investigation is at an end." *Katazenbach v. McClung, supra,* at 303-04.

The legislative history of this Act is lengthy. The Court has studied the Senate, House, and Joint Conference Committee Reports,[19] as well as the transcript of

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ered in deciding whether state sovereignty has been impermissibly violated. The limits of judicial analysis are clearly defined in *Heart of Atlanta Motel, Inc. v. U.S.,* 379 U.S. 241, 261-62:

> "It may be argued that Congress could have pursued other methods to eliminate the obstructions it found in interstate commerce caused by racial discrimination. But this is a matter of policy that rests entirely with the Congress not with the courts. How obstructions in commerce may be removed — what means are to be employed — is within the sound and exclusive discretion of the Congress. It is subject only to one caveat — that the means chosen by it must be reasonably adapted to the end permitted by the Constitution. We cannot say that its choice here was not so adapted. The Constitution requires no more."

18. Congress need not make formal, statutory findings if the evidence presented fully indicates the nature and effect of the burdens on commerce which Congress intended to alleviate. See *Katzenbach v. McClung,* 379 U.S. 294 (1964); *U.S. v. Dawson,* 467 F.2d 668 (8th Cir. 1972), cert. denied 410 U.S. 956. Neither must particularized findings be made for each point of a program. See *U.S. v. Sacco,* 491 F.2d 995 (9th Cir. 1974).

19. S. Rep. No. 94-436, 95th Cong., 2d. Sess. reprinted in (1978) U.S. Code Cong. & Ad. News 7855, et seq. (hereafter "S. Rep. 95-436 at ____"); H.R. Rep. No. 95-496 Part IV, 95th Cong., 2d. Sess. reprinted in (1978) U.S. Code Cong. & Ad. News 8454, et seq. (hereafter "H.R. Rep. 95-496 at ____"). Joint Explanatory Statement of the Committee on Conference, H.R. Rep. No. 95-1752, 95th Cong., 2d. Sess. (hereafter Conference Report).

hearings before the House Subcommittee.[20] The history reveals that the evidence relied on by the Congress was that since 1967, production of natural gas has consistently exceeded new additions to proved reserves;[21] known gas reserves outside Alaska have declined dramatically,[22] and the interstate market has suffered as a result of this decline;[23] since 1969 more than 80% of all new gas has been committed to the intrastate market, most of the interstate commitments coming from the federal domain;[24] between 1967 and 1975, reserves dedicated to interstate use have dropped 46%, as opposed to a 3% decline in the intrastate markets for this period;[25] the volume of gas sold interstate has likewise decreased;[26] the higher prices received in intrastate sales were blamed for the reduction of gas dedicated to interstate markets, and the corresponding shortages of natural gas in non-producing states, particularly the severe shortage in the winter of 1976-77.[27] From a review of the facts and testimony before Congress, the Court must

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20. National Energy Act: Hearings on H.R. 6831 before the Subcomm. on Energy and Power of the House Comm. on Interstate and Foreign Commerce, 95th Cong., 1st Sess. (1977) (hereafter referred to as "H.R. Hearings ____").

21. H.R. Rep. 95-496 at 91.

22. *Id.*

23. S. Rep. 95-436 at 8, 25; H.R. Rep. 95-496 at 90-95.

24. S. Rep. 95-436 at 19.

25. H.R. Hearings 299-301 (Graphs published by FPC Bureau of Natural Gas, attached to prepared statement of C. M. Allen, Division Natural Gas Geologist with Phillips Petroleum Co.).

26. H.R. Rep. 95-496 at 95; S.Rep. 95-436 at 8.

27. See, e.g., S.Rep. 95-436 at 19, 21, 25; H.R. Rep. 95-496 at 92-95.

conclude that from the evidence before it a rational basis existed for the Congress' finding that unregulated intrastate gas "imposed a burden" on interstate commerce under the tests cited above.

Those provisions of the NGPA attacked by plaintiffs which do not affect the price of intrastate gas likewise have a rational basis and do not exceed Congress' Commerce Clause power. The emergency purchase and allocation authority of the President, as well as provisions affecting allocation and distribution of intrastate gas into interstate pipelines are necessary to the purpose of the NGPA in reducing impediments to the flow of gas between interstate and intrastate markets, and insuring availability of natural gas.[28] These provisions, while affecting intrastate commerce, are necessary to effectuate Congress' chosen scheme of regulation of interstate commerce.

The next consideration is whether the regulatory scheme adopted by Congress is reasonably adapted to eliminating the burden on interstate commerce. In this respect, to be constitutionally permissible, Congress is not required to employ the best or least restrictive methods, but only reasonable ones. *Heart of Atlanta Motel, Inc. v. United States, supra.* Congress' overall analysis of the problem was very simply a choice between total deregulation or inclusion of the intrastate markets in a federal regulatory scheme.[29] The Court is unable to find much, if any, disagreement in the testimony before Congress that elimination of the previously

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28. H.R. Hearings 66-67 (Statement of James R. Schlesinger, Assistant to the President).

29. H.R. Rep. at 110-11; S. Rep. at 34; H.R. Hearings at 388 (comments of David H. Foster, Executive vice pres., Natural Gas Supply Comm.), 475 (comments of Congressmen Sharp and Walgren), 523-24 (statement of Mack Wallace, Chairman of the Railroad Commission of Texas).

existing problems of the dual market system was necessary to the formulation of an adequate energy program. The Court concludes that Congress' choice of total regulation, i.e., inclusion of the intrastate market in the federal regulatory scheme, was "rationally based", as the Constitution requires, on the evidence before it, particularly the contention that severe hardship would accrue to individual consumers as a result of total deregulation and corresponding price increases. While this evidence and conclusion is the subject of much debate, the decision cannot be held to be irrational as a matter of law. Evidence considered by the Congress predicted that removal of all price restraints on new gas would result by 1985 in an annual shift of as much as $20 billion from consumers to producers over revenues obtained through price ceilings, with little additional supply.[30] Another estimate of cost to consumers was $53-$79 billion in the next eight years.[31] Evidence of this dramatic impact on consumers,[32] coupled with what Congress was told of the possibility of huge windfall profits to producers, as well as other problems, apparently convinced Congress to adopt the NGPA, rather than some form of deregulation.[33] However doubtful the Court might be that the method chosen by Congress to encourage production and exploration and insure availability of natural gas is

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30. H.R. Hearings at 68, 73 (Statement of James R. Schlesinger, Ass't to Pres., and accompanying chart).

31. H.R. Rep. 95-496 at 118.

32. See, e.g., testimony relating to the effect of deregulation on consumers, H.R. Hearings at 561-63 (statement of Edwin L. Faust, Mayor, Grey Forest, Texas), 564-73 (statement of Lane Denton, Legislative Dir., Texas Farmer's Union).

33. See, e.g., H.R. Rep. 95-496 at 95, 97-101, 110-118; S. Rep. 95-436 at 34.

a wise one,[34] it is not the function of the judiciary to re-write the law by substituting its judgment in such policy matters for that of Congress. The question before the Court is one of constitutionality, not policy. That the regulation imposed in the NGPA is at least reasonable in the context of constitutional standards is an inescapable conclusion, when the legislative history and the alternatives available are considered.

While enactment of the NGPA is within constitutional congressional commerce power, the inquiry is not at an end. In *National League of Cities v. Usery,* 426 U.S. 833 (1976), the Supreme Court held that the power to legislate pursuant to the Commerce Clause is limited by the constitutional doctrine of intergovernmental immunity, i.e., Congress may not interfere with state sovereignty, even under the guise of otherwise permissible Commerce Clause power. The test enunciated in *National League of Cities* is whether Congress impinges upon the sovereign power of the "state qua state" in performing essential governmental functions. The Court listed examples of traditional state operations (a typical but not exhaustive list) as fire and police protection, sanitation, public health, and parks and recreation. *Id.* at 851. Plaintiff States assert that federal regulation of intrastate gas will severely reduce state revenues which are presently devoted in the various states to education, roads, services programs, and/or other essential state services, thereby destroying the economic integrity of the states. The states further assert that the Act would impose federal regulation of natural resources, and interfere with the administration, use, control and conservation of resources from state-owned land, both areas previously reserved to the states. While plaintiffs make a

34. One commentator concludes that "[t]he NGPA reveals congressional concern not for equity and efficiency in the use of natural resources, but rather for the most obvious and numerous group of voters." MacAvoy, "The Natural Gas Policy Act of 1978", 19 *Nat. Resources J.* 811, 828 (1979).

convincing argument that the federal regulation is unwise, the Court cannot agree that the regulation imposed by the NGPA is unconstitutional under *National League of Cities,* for two different but fundamental reasons. First, the states have made only several generalized and hypothetical conclusions with respect to losses of revenues under the Act. A particularized assessment of actual impact would not be crucial to the resolution of this issue under *National League of Cities,* if some factual showing establishes that the impact is so great as to displace the state's freedom to structure integral operations in areas of traditional governmental functions. Here the absence of facts demonstrating the required magnitude of impact is important because the states' main objection to the Act appears to be a reduction of revenues. It is also important because the Act, while imposing a ceiling on intrastate gas prices, also raises the interstate price, so that while revenue from intrastate gas may decrease, revenue from interstate gas increases. The net effect of the entire Act is not evaluated in plaintiffs' affidavits, and there is no way to determine, from the information before the Court, just how drastic the loss of revenue or services is or may be.[35] The cost of complying with federal regulation and the corresponding reduction of the quality of state-provided services were primary considerations in *National League of Cities.* The states have not made a sufficient showing in these respects.

Secondly, and most importantly, the power to regulate gas produced and sold intrastate is not the type of

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35. In the only affidavit to refer to specific dollar amounts, before and after passage of the Act, it appears that the State of Wyoming had billed more severance taxes in the first seven months of 1979, under the NGPA, than had been collected the entire year in 1978. Aff. of Rudolph Anselmi, Chairman, Wyoming Department of Revenue and Taxation.

"traditional state function" from which Congress is prohibited from interfering under *National League of Cities.* It is not the states' roles as providers of roads, education, and similar traditional state functions which is infringed by the Act, but, if anything, their choice of methods by which to fund such functions. The distinction is essential. Under the NGA, the Supreme Court has rejected an argument that impairment of state revenues must be considered. *In Re Permian Basin Area Rate Cases,* 390 U.S. 747, 822, n. 114 (1968); *FPC v. Hope Gas Co.,* 320 U.S. 591 (1944). While the impact on individual state treasuries is a critically important factor for the Congress to consider, the constitutionality of the Act is not necessarily dependent on it. If the financial impact on the functioning of the governmental bodies involved were so severe as to impair the states' ability to function effectively in a federal system, as in *National League of Cities,* then it could be said that the impact and intrusion threatens the states' separate and independent existence. *Coyle v. Oklahoma,* 221 U.S. 559 (1911). Such is not the case here. Federal regulation which has an indirect effect on state treasuries is not the same impermissible intrusion on state sovereignty found in *National League of Cities.* See *Public Service Co. v. FERC,* 587 F.2d 716 (5th Cir. 1979), cert. denied ___ U.S. ___, 100 S.Ct. 166.

Plaintiffs' argument that federal regulation of gas produced on state land is prohibited by *National League of Cities* was rejected in *Public Service Co. v. FERC,* supra. There the Fifth Circuit concluded that commercial activity operated by a state is subject to federal regulation and is not a "traditional governmental function" of the sort described in *National League of Cities.* The state has traditionally been subject to federal regulation under the Commerce Clause when it engages in economic activities of a proprietary nature, similar to those of private parties. See, e.g., *Parden v. Terminal Railway,* 377 U.S. 184 (1964); *California v. Taylor,* 353

U.S. 533 (1957); *Case v. Bowles,* 327 U.S. 92 (1942). Plaintiffs' argument in this respect must fail.

Plaintiffs' final argument under *National League of Cities,* that the conservation of natural resources is a traditional state function with which Congress may not interfere, is rejected in a long line of precedent recognizing the states' traditional role in conservation of natural resources, but holding that the states may not encroach, through conservation measures, upon preemptive federal regulation under the NGA. See, e.g., *Northern Gas Co. v. Kansas Commission,* 372 U.S. 84 (1963); *FPC v. Corporation Commission of State of Oklahoma,* 362 F.Supp. 522 (W.D. Okla. 1973), aff'd without opinion, 415 U.S. 961 (1974). Congress may preempt state conservation regulation which interferes with or burdens interstate commerce. *Hughes v. Oklahoma,* 441 U.S. 322 (1979); *Douglas v. SeaCoast Products, Inc.,* 421 U.S. 265 (1977). Moreover, plaintiffs have not demonstrated how the NGPA conflicts with, or detracts from their current conservation policies or procedures to the extent that traditional governmental functions are displaced.[36]

Finally, plaintiffs argue that the NGPA is in conflict with the Submerged Lands Act, 43 U.S.C. §§1301-1315, which specifically recognizes state ownership of lands beneath their navigable waters, and the natural resources therein. While §1314(a) of the SLA excludes the United States' rights of "ownership, . . . management,

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36. *Virginia Surface Mining and Reclamation Assoc., Inc. v. Andrus,* No. 78-0224-B (W.D. Va. Jan. 3, 1980) enjoined certain portions of the Surface Mining Control Reclamation Act of 1977 as violative of the 10th Amendment under *Nat. League of Cities.* The Court held that state regulation of land use is a traditional governmental function, and the enjoined portions of the Act, as they displaced the state's ability to make "essential decisions" and deprived the state of any discretion or control over economic development in the affected areas, were violative of the 10th Amendment. The NGPA does not so totally displace state control or discretion, and cannot be struck down on this theory.

administration, leasing, use, and development of . . . natural resources," the same section also specifically retains the federal power of regulation and control of such lands for the purpose of commerce. Thus federal power to regulate such lands was not curtailed by the SLA. *United States v. Rands*, 389 U.S. 121 (1967); *Zabel v. Tabb*, 430 F.2d 199 (5th Cir. 1970), cert. denied, 401 U.S. 910. Correspondingly, regulation of natural resources contained in such lands was not curtailed, either. The conflict imagined by plaintiffs in this instance does not exist.

The Court therefore finds that the NGPA and its federal regulation of intrastate gas is a legitimate exercise of Congress' power under the Commerce Clause and is not barred by the Tenth Amendment, the doctrine of intergovernmental immunity, or any other constitutional limitation.

Title V

Having found that the regulation of wholly intrastate gas provided in the Act does not exceed Congress' constitutional power and does not, in general, interfere with the traditional functions of "states qua states", the Court next turns to a more particular analysis of Title V of the Act, and specifically §503. As noted at pp. 8 and 9, supra, Title V sets out procedures for implementation and judicial review. Two distinct challenges have been made to these procedures. The states argue that the administrative burden imposed upon them under the Act violates state sovereignty, the constitutional doctrine of intergovernmental immunity, the constitutional guarantee of a republican form of government, due process, equal protection, and the Tenth Amendment. Plaintiff intervenor Harvey argues that the amalgamation of state-federal court review violates state sovereignty and the Tenth Amendment.

Federal Review of State Agency Determination

Section 503 requires sellers of natural gas to obtain a determination of the maximum lawful price under Title I of the Act before charging the maximum price. The state agency having regulatory jurisdiction over the production of natural gas is authorized to make this determination. Procedure in the state agency is that generally applicable in the agency, but FERC may "prescribe the form and content" of filings with the agency. Section 503(c)(3). State agency decisions are not reviewable except as provided in the Act, §503(c)(4), which requires review in FERC, with further review in a United States Circuit Court of Appeals. Section 503(b). The state agency must give notice of its determinations to FERC, including the substantiation, and in the manner which FERC may, by rule, require. Section 503(a)(2). FERC may reverse any state agency determination which is not supported by substantial evidence in the record, §503(b)(1)(A), and may remand if not consistent with information in FERC's public records. Section 503(b)(2).

There can be no serious question that Congress may confine jurisdiction over suits involving federal law to the federal courts, and thus the review procedures of the NGPA, per se, are not attacked, only that they are engrafted upon a state agency determination. In *Holmgren v. United States*, 217 U.S. 509, 517 (1910), the Supreme Court stated:

> "It is undoubtedly true that the right to create courts for the states does not exist in Congress. The Constitution provides [art. 3, §1] that the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may, from time to time, ordain and establish. But it does not follow that Congress may not constitutionally authorize the magistrates or courts of a state to enforce a statute. . . .

> The question is not here presented whether the states can be required to enforce such . . . laws against their consent,. . . . Unless prohibited by state legislation, state courts and magistrates may exercise the powers conferred by Congress under such laws. . . ."

It is no longer questioned that Congress may delegate certain adjudicatory and legislative duties to an administrative agency. There is no indication in any authority provided to or found by the Court that this delegation may not properly be made to a state rather than federal administrative agency. The NGPA does not impose the federal appellate process on a state agency determination, as argued by Harvey. Rather, it makes the state agency determination the first step in the federal administrative chain, delegating to the state agency, providing it consents, the duty of making the initial determination under the Act, with review thereafter in the appropriate federal forum.

Congress has not exceeded the limitation of the Tenth Amendment and the doctrine of intergovernmental immunity in delegating the initial price determination to state agencies. The test, as discussed above, is whether the challenged legislation directly displaces "the States' freedom to structure integral operations in areas of traditional governmental functions." *National League of Cities v. Usery,* supra, at 852. While not mentioned as an example in *National League of Cities,* a state's administrative and judicial processes must surely constitute a "traditional governmental function." However, the Act does not intrude on or displace the state's freedom to structure these processes within the meaning of these limitations. FERC must affirm if the state agency determination is supported by substantial evidence. De novo review is not prescribed at any appellate level and thus the state agency's findings are given conclusive weight if supported by substantial evidence. Additionally, the conference committee report makes clear the Act's in-

tent that traditional state review over procedural matters is not precluded under the Act.[37] Thus, a party is entitled to all procedural requirements of the particular state agency and also to state court review of those procedures. In this way no state-prescribed rights are forfeited by the Act. A party may proceed by appeal to both the appropriate state court on procedural matters and to FERC on the question of substantial evidence. Finally, while Harvey complains that certain subsections of §503 allow FERC to prescribe rules of procedure in the initial state agency determination, he makes no showing that any such rules have been promulgated or that they would circumvent the agency's own rules.[38] This argument is either premature or unsupported in the record and does not serve to support Harvey's Tenth Amendment argument.

The Court must therefore conclude that the provisions in §503 which delegate the initial determination of maximum price to the appropriate state agency, with review in the federal courts, are permissible under Article III of the Constitution and the Commerce Clause, and do not violate, in an unconstitutional manner, the sovereignty of the states.

States' Challenge to Title V

The plaintiff States do not separate their attack on Title V from their remaining Tenth Amendment arguments; the Court has chosen to do so because the considerations involved in an analysis of Title V of the Act are

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37. Joint Explanatory Statement of the Committee on Conference, H.R. Rep. No. 95-1752, 95th Cong. 2d Sess. 119.

38. While the Court has found that the plaintiffs' complaint, in citing sections of the Act which delegate power to enact rules to FERC, presents a case or controversy, ripe for review, in that context the issue presented is specific and concrete. Here, with Harvey's specific attack of subsections of 503 which allow, but do not require, FERC regulation, and with no showing of either the existence of scope of pertinent rules which *might* be in conflict *if* FERC promulgates rules, the Court would be ruling on hypothetical facts.

different from those concerning congressional power to regulate wholly intrastate gas. The states argue that they are coerced into administering the Act, spending state funds for the operation of a federal program on behalf of a federal agency. This is contended to be an impermissible intrusion into traditional state functions. *National League of Cities v. Usery,* supra. Defendants respond simply that the states are not coerced to act and that therefore the administrative scheme is constitutional.

The distinction between "coercion" and "permission" is supported in a long line of precedent which holds that the federal government may delegate implementation of federal programs to states willing to comply. These cases arise for the most part from legislation conditioning the grant of federal funds upon the state's compliance with some federal program. Rejection of state sovereignty arguments is on the theory that the state has "the 'simple expedient' of not yielding to what she urges is federal coercion." *Oklahoma v. Civil Service Commission,* 330 U.S. 127, 143-44 (1946). See also *Steward Machine Co. v. Davis,* 301 U.S. 548 (1937);; *Florida v. Mathews,* 526 F.2d 319 (5th Cir. 1976); *Doe v. Rose,* 499 F.2d 1112 (10th Cir. 1974); *Arizona State Dept. of Public Welfare v. HEW,* 449 F.2d 456 (9th Cir. 1971), cert. denied 405 U.S. 919; *Stiner v. Califano,* 438 F.Supp. 796 (W.D. Okla. 1977); *Goodin v. Oklahoma,* 436 F.Supp. 583 (W.D. Okla. 1977). These cases are, of course, distinguishable, as the question here is not whether Congress can condition payment of federal funds on the state's compliance with the Act, as there are no funds involved. This, in fact, is the state's main complaint — that they are required to expend their own funds to administer the federal regulatory scheme. The states' complaint with respect to the NGPA is more analogous to cases like *Friends of the Earth v. Carey,* 552 F.2d 25 (2nd Cir. 1977), where the court stated that when the implementation by the states of a federal act cannot, under the act, be enforced by the imposition of sanctions, the Tenth

Amendment is not implicated. The quid pro quo for state compliance was said to be that the federal government would not substitute or administer its own plan for that of the state. See also *Natural Resources Defense Council, Inc. v. Costle,* 564 F.2d 573 (D.C. Cir. 1977); *Sparks v. Wyeth Laboratories, Inc.,* 431 F.Supp. 411 (W.D. Okla. 1977). The standard against which these cases were decided is that discussed in *District of Columbia v. Train,* 521 F.2d 971 (D.C. Cir. 1975) vacated, 431 U.S. 99 (1977) reinstated and modified sub nom. *District of Columbia v. Costle,* 567 F.2d 1091 (D.C. Cir. 1977); *Maryland v. EPA,* 530 F.2d 215 (4th Cir. 1975) vacated, 431 U.S. 99 (1977); *Brown v. EPA,* 521 F.2d 827 (9th Cir. 1975) vacated, 431 U.S. 99 (1977).[39] In these cases regulations of the Environmental Protection Agency promulgated under the Clean Air Act were invalidated because the states were subject to sanctions if they did not devise a federally-accepted program of implementation of the Act. The NGPA in §503 "authorizes" appropriate state agencies to make certain determinations. There is no requirement of state cooperation and no sanctions are levied in the event a state agency refuses to act. While the Act requires the agreement of FERC before a waiver of state authority is effective, §503(c)(2), there is no mandatory requirement of state agency action even absent FERC's agreement, and no sanction provided for a state whose agency does not act. Thus there is no "coercion" in the constitutional sense, and the Act in this respect must be upheld. As there is no evidence of any agency of state having attempted to

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39. Although all three of these opinions were vacated by the Supreme Court in *EPA v. Brown,* 431 U.S. 99 (1977), the action of the Court was taken in light of the Administrator's abandonment of certain issues, his admission that certain of the rules as drafted were invalid, and the resultant narrowing of issues on appeal. The cases were remanded for consideration of the question of mootness, and the Court's action does not overturn or dilute the reasoning or result reached in the Courts of Appeals.

obtain FERC's agreement to a waiver, the Court cannot speculate as to the difficulties or conditions which might be encountered by a state attempting to waive its authority. Whether FERC's refusal to enter into an agreement, or its placing conditions upon it, might invalidate this portion of the Act as an impermissible invasion of state sovereignty is, at this time, not ripe for review.

The states have raised an additional argument, that the equal footing doctrine prevents the administrative burden imposed upon the states under the NGPA. They argue that it is fundamentally unfair to require the natural gas producing states to unilaterally shoulder the economic burden, for the benefit of nonproducing states, of implementing a federal regulatory scheme which, in addition to the costs of administration, otherwise severely reduces state revenues. This burden, they argue, is not imposed on states producing other or no energy resources, and the effect is thus contrary to the equal footing doctrine. The Court, sitting as it does in a state long dependent on the natural gas industry, is understandably sympathetic to plaintiffs' arguments. It is inequitable to impose both revenue-reducing regulations and the cost of their administration upon certain states only. The government has offered no example of an analogous regulatory scheme, despite repeated inquiries from the Court at oral argument to do so. But, while citizens of gas producing states may justifiably complain that Congress' scheme is practically and economically unwise and unfair, the Court is compelled to conclude that the policy adopted by Congress is within its legislative powers and is not constitutionally impermissible.[40] As a matter of constitutional law, the equal foot-

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40. The states' theory under the equal footing doctrine appears to be an ingenious attempt to assert what would otherwise be a due process claim, which, for the reasons stated below, is unavailable to the states. Disguising such a claim under the rhetoric of the equal footing doctrine does not create standing on the part of the states to assert it.

ing doctrine does not require economic equality among the states. *United States v. Texas,* 339 U.S. 707 (1950). As the Act does not command any state action, and the states are free to refuse to act and thus to avoid payment for administration, there can be no violation of either the Tenth Amendment or the equal footing doctrine. The Court therefore holds §503 to be constitutionally permissible.

Fifth Amendment Claims

The plaintiff States have alleged that certain portions of the NGPA violate the Fifth Amendment, i.e., due process, equal protection, and a taking without just compensation. The states are not "persons" within the language of the due process clause, and their claims on this ground are without merit. *South Carolina v. Katzenbach,* 383 U.S. 301 (1966). Neither does a state have standing to raise due process claims on behalf of its citizens against the federal government. *South Carolina v. Katzenbach,* supra; *Florida v. Mellon,* 273 U.S. 12 (1927). As equal protection is implicated in the Fifth Amendment, if at all, through the due process clause,[41] the states can have no standing on those claims, as well. Insofar as plaintiff States are entitled to raise due process claims on their own behalf, as producers of natural gas on state-owned lands, their claims must fail for the same reasons discussed with respect to plaintiff-intervenor Harvey's claims, pp. 15-18, supra. Finally, federal regulation of prices does not constitute a taking without just compensation under the Fifth Amendment. *The Permian Basin Area Rate Cases,* 390 U.S. 747 (1968); *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241 (1964); *FPC v. Hope Natural Gas Co.,* 320 U.S. 591 (1944). The Court therefore concludes that the Fifth Amendment claims of the plaintiff states are without merit.

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41. *Bolling v. Sharpe,* 347 U.S. 497 (1954).

Guarantee Clause

The NGPA does not violate the constitutional guarantee of a republican form of government, as alleged by plaintiff States. No argument has been made in support of this allegation, and it is obvious that federal regulation of intrastate gas does not modify any state government, or in any way deny a republican form of government to any state.

Eleventh Amendment

Plaintiff States generally aver that various portions of the Act violate their Eleventh Amendment rights. This general allegation is elaborated only by plaintiffs' argument that Title V of the Act forces the states "to become party to federal court proceedings in order to defend their own determinations."[42] Section 503(b)(4)(A) and (B), referred to by plaintiffs, do not require states to become parties to any proceedings or in any way violate the Eleventh Amendment.

Conclusion

In accordance with the foregoing, the Court finds the Natural Gas Policy Act to be constitutional. This decision does not find the Act to be wise or fair or best suited to meet the present and future economic and energy needs of the nation. But it is fundamental that establishment of policy in these respects is the business of the elected legislative branch — the Congress. As long as the laws enacted are within its constitutional authority the Courts are not empowered to re-write, or veto them, or to second-guess or otherwise undo its chosen policy despite possible errors of judgment. Accordingly, the motions for summary judgment on behalf of plaintiffs and intervening plaintiffs are denied; the motion to dismiss of defendant and intervening defendant is denied; the motion for summary judgment of defendant

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42. Plaintiffs' brief in support of plaintiff's motion for summary judgment, p. 10. See also *id.* at 34.

and intervening defendant is granted. Judgment shall enter accordingly.

It is so ordered this 4th day of June, 1980.

UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JULY TERM, September 22, 1981

Before Honorable James E. Barrett, Honorable William E. Doyle,, and Honorable Monroe G. McKay, Circuit Judges

THE STATES OF OKLAHOMA, TEXAS, LOUISIANA AND WYOMING; SHIRLEY McNAMARA, SECRETARY OF THE LOUISIANA DEPARTMENT OF REVENUE AND TAXATION and WILLIAM C. HULS, SECRETARY OF THE LOUISIANA DEPARTMENT OF NATURAL RESOURCES *Plaintiffs-Appellants,* and RALPH L. HARVEY, individually and as president of Marlin Oil Company, *Intervenor-Plaintiff,* vs. FEDERAL ENERGY REGULATORY COMMISSION and UNITED STATES OF AMERICA, *Defendants-Appellees,* WASHINGTON LEGAL FOUNDATION and DAVID E. ENGDAHL, *Amici-Curiae.*	)))))))))))JUDGMENT)) No. 80-1748)) No. 80-1824)) (D.C. NO.) 78-01251 T)))))))

This cause came on to be heard on the record on appeal from the United States District Court for the Western District of Oklahoma, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS,Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

THE STATE OF OKLAHOMA, by and through LARRY DERRYBERRY, ATTORNEY GENERAL OF THE STATE OF OKLAHOMA; DAVID L. BOREN, GOVERNOR OF THE STATE OF OKLAHOMA; THE STATE OF TEXAS, by and through JOHN L. HILL, ATTORNEY GENERAL OF THE STATE OF TEXAS; DOLPH BRISCOE, GOVERNOR OF THE STATE OF TEXAS; THE STATE OF LOUISIANA, by and through WILLIAM J. GUSTE, JR., ATTORNEY GENERAL OF THE STATE OF LOUISIANA; EDWIN EDWARDS, GOVERNOR OF THE STATE OF LOUISIANA; SHIRLEY McNAMARA, SECRETARY OF THE STATE OF LOUISIANA DEPARTMENT OF REVENUE AND TAXATION, and WILLIAM C. HULS, SECRETARY OF THE LOUISIANA DEPARTMENT OF NATURAL RESOURCES, *Plaintiffs*	)
THE STATE OF WYOMING, by and through its Attorney General; RALPH L. HARVEY, Individually and as president of Marlin Oil Corporation, *Intervening Plaintiffs*	)
vs.	) No. CIV-78-01251-T
FEDERAL ENERGY REGULATORY COMMISSION, *Defendant*	)
UNITED STATES OF AMERICA, *Intervening Defendant*	)

JUDGMENT

This case having come on to be heard before this Court on the pleadings, and upon examination of the pleadings, motions, briefs, exhibits, and arguments of counsel, the Court is of the opinion as shown by its Memorandum Opinion filed herein, that there is no genuine issue as to any material fact and that the defendant and intervening defendant are entitled to judgment as a matter of law.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that judgment should enter for the defendant and intervening defendant and the case should be and hereby is dismissed.

DATED this 4th day of June, 1980.

/s/

UNITED STATES DISTRICT JUDGE

Entered in judgment docket June 4, 1980

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

THE STATE OF OKLAHOMA, et al.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. CIV-78-1251T
	)	
FEDERAL ENERGY REGULATORY COMMISSION,	)	
	)	
Defendant.	)	

AMENDMENT AND SUPPLEMENTATION TO ORIGINAL COMPLAINT OF THE PLAINTIFFS

COME NOW the original plaintiff States of Oklahoma, Louisiana and Texas, and in response to the Order of the Court entered February 7, 1979, directing the plaintiffs to amend their Complaint "to set out the information delineated in defendant's Motion" for a more definite statement, offer to the Court the following amendments and supplements to their Original Complaint.

I.

Count One of the Original Complaint is to amend and supplemented to read as follows:

> "All plaintiffs allege and state to the Court that the federal regulation of wholly intrastate gas as provided under the subject Act (The Natural Gas Policy Act of 1978, Public Law 95-621, 92 Stat. 3350, *eq seq.*) that is, all provisions thereof purporting to affect, directly or in-

directly, intrastate gas in any manner whatsoever, and more particularly, but not exclusively limited to, Sections 2, 101 , 102, 103, 105, 106, 107, 108, 109, 121, 122, 201-206, 301-304, 311-315, 504 and 602, exceeds the grant to Congress of constitutional power to regulate "commerce among the several states", Article I, United States Constitution, Section 8, Clause 3, and abrogates the provisions of the Tenth Amendment of the United States Constitution as well as being a denial of Equal Protection of the laws and Due Process of the law."

II.

Count Two of the Original Complaint is to be amended and supplemented to read as follows:

"Plaintiffs further allege and state that all provisions of subject Act which attempt to coerce plaintiffs into enacting substantial state legislation, assigning state employees, and expending substantial state funds to assist defendants in implementing the federal policy therein set forth, which attempt to dictate to plaintiffs who shall be parties to plaintiffs' regulatory proceedings, or which in any way directly or indirectly coerce plaintiffs to implement such federal policy, particularly, but not exclusively limited to, Sections 304, 312, 501, 503, 504, 505 and 506, are an invasion of state sovereignty and inter-governmental immunity, violative of the constitutional guarantee of a republican form of government as set forth at Article IV, Section 4, United States Constitution; and further that such attempt exceeds the power of the Congress under the Commerce Clause, denys Plaintiffs Equal Protection and Due Process of law, and violates the Tenth

Amendment of the United States Constitution."

III.

Count III of the Original Complaint is to be amended and supplemented to read as follows:

III-A

"Plaintiff State of Texas additionally alleges and states to the Court that the federal regulation of natural gas produced from the public lands of the State of Texas violates the very terms upon which the United States offered and the Republic of Texas accepted admission into the United States. The Act, including but not limited to Sections 2, 101, 103, 105, 106, 107, 108, 109, 121, 122, 301, 302, 303, 304, 314, 315, 501, 503, 504, 505, 506, and 602 of said Act, insofar as it purports to regulate natural gas produced from the public lands of the State of Texas, intrudes into the powers reserved to the State of Texas and is violative of the Tenth Amendment to the United States Constitution."

III-B

"Pursuant to the powers vested in it by Article IV, § 3, Para. 1, U.S.Const., Congress by enactment, 34 Stat. 267, June 16, 1906 (Enabling Act), established the terms and conditions upon which the State of Oklahoma would be admitted to the Union of States. Sections 7 and 12 of the Enabling Act granted to the State of Oklahoma substantial tracts of land for the support and maintenance of common schools. Sections 8, 10, and 12, of the Enabling Act

granted to the State of Oklahoma substantial tracts of land for the support and maintenance of state institutions of higher education and other public institutions. The use, sale, and/or lease of these granted lands were made subject to the mandatory trusteeship and regulation of the State of Oklahoma on specified terms as a precondition to admission to the Union of States. Sections 8-12, 34 Stat. 267.

"Pursuant to and in full compliance with the terms and regulations for admission to the Union of States, the People of the State of Oklahoma enacted a Constitution. In full compliance with the mandatory duty imposed by the Enabling Act, the People of the State of Oklahoma pledged the faith of the state to accept the granted tracts of land 'for the uses and purposes and upon the conditions, and under the limitations for which the same are granted and donated; . . .' Art. XI, § 1, Okla. Const.

"The rights, powers and duties with respect to lands granted and donated to the State of Oklahoma under the Enabling Act, are fixed and vested, being beyond the power of the Congress to vary by statutory enactment. The provisions of Public Law 95-621 (Act), including but not specifically limited to Section 2, 101,-103, 205-109, 122, 301-304, 314, 315, 501-506, and 602 of the Act effectively impede and preclude the proper and lawful use, enjoyment and administration of lands granted to the State of Oklahoma for the support of common schools, higher education and public institutions. The Act violates the public contract contemplated by Art. IV, § 3, Para. 1, U.S. Const., deprives the People of the State of Oklahoma of property without due process of

law or just compensation in violation of Amendments V and XIV to the United States Consitution, and precludes the exercise of sovereign powers expressly reserved and delegated to the State of Oklahoma as a condition to its admission to the Union of State in derogation of the Amendments X and XI to the United States Constitution."

IV.

Count Four of the Original Complaint is to be amended and supplemented to read as follows:

"1. The subject States additionally allege and state that those provisions of the subject Act, that is, all provisions thereof purporting to provide authority, directly or indirectly, for the allocation and distribution of intrastate natural gas into interstate pipelines or distribution entities otherwise, particularly but not exclusively limited to, Sections 201-206, 301-304, 311-315, and 504, are unconstitutional under the Federal Constitution in that said provisions exceed the regulatory authority of Cong s as provided for at Article I, Section 8, Clause 3, constitute an invasion into the subject States' sovereignty and immunity as provided for under the Tenth Amendment, Equal Protection, and Due Process rights of the citizens of the subject States."

V.

Prayer for Relief

WHEREFORE, the plaintiffs pray this honorable Court to enter its Order adjudging and declaring the aforementioned provisions of Public Law 95-621 to be

unconstitutional and not lawfully binding upon the plaintiff States for the reasons as heretofore set forth in the Original and Amended Complaints of the plaintiff states.

Respectfully submitted,

JAN ERIC CARTWRIGHT
Attorney General of Oklahoma

MARK WHITE
Attorney General of Texas

WILLIAM J. GUSTE, JR.
Attorney General of Louisiana

By: /s/ John F. Percival
JOHN F. PERCIVAL
Assistant Attorney General

Attorneys for Plaintiffs

CONSTITUTIONAL AND STATUTORY APPENDIX

The Constitution, Article IV, Section 4, provides:

> The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

The Constitution, Amendment X, provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The Constitution, Amendment XI, provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Natural Gas Policy Act, codified at 15 U.S.C. §3413, provides:

> (a) GENERAL RULE.—
>
> > (1) DETERMINATION.—If any State or Federal agency makes any final determination which it is authorized to make under subsection (c) of this section for purposes of—

(A) applying the definition of new natural gas under section 3312(c) of this title;

(B) deciding if certain natural gas produced from the Outer Continental Shelf qualifies under section 3312(d) of this title for the new natural gas ceiling price;

(C) applying the definition of new, onshore production well under section 3313(c) of this title;

(D) applying the definition of high-cost natural gas under section 3317(c) of this title; or

(E) applying the definition of stripper well natural gas under section 3318(b) of this title;

such determination shall be applicable under this chapter for such purposes unless such determination is reversed under the provisions of subsection (b) of this section or unless such State or Federal agency has waived its authority under the provisions of subsection (c) of this section.

(2) NOTICE TO COMMISSION.—Any Federal or State agency making a determination under paragraph (1) shall provide timely notice in writing of such determination to the Commission. Such notice shall include such substantiation and be in such a manner as the Commission may, by rule, require.

(b) COMMISSION REVIEW.--

(1) AUTHORITY TO REVIEW AND REVERSE.—The Commission shall reverse any final State or Federal agency determination described in subsection (a) of this section if—

(A) it makes a finding that such determination is not supported by substantial evidence in the record upon which such determination was made; and

(B) such preliminary finding and notice thereof under paragraph (3) is made within 45 days after the date on which the Commission received notice of such determination under subsection (a)(2) of this section and the final such finding is made within 120 days after the date of the preliminary finding.

(2) REMAND ON BASIS OF COMMISSION INFORMATION.—If—

(A) the Commission finds that a State or Federal agency determination is not consistent with information contained in the public records of the Commission, and which is not part of the record upon which such determination was made; and

(B) such preliminary finding and notice thereof under paragraph (3) is made within 45 days after the date on which the Commission received notice

of such determination under subsection (a)(2) of this section and the final such finding is made within 120 days after the date of the preliminary finding,

it may remand the matter to such State or Federal agency for consideration of such information. If such agency, after consideration of the information transmitted to it by the Commission, affirms its previous determination, such determination, as so affirmed, shall be subject to review in accordance with this subsection (other than this paragraph).

(3) NOTICE.—The Commission shall provide notice of any proposed finding under this subsection to the State or Federal agency which made such determination and those parties identified in the notice to the Commission of such determination.

(4) JUDICIAL REVIEW OF COMMISSION ACTIONS.—

(A) REMANDS.—Any party identified in the notice to the Commission of a determination by a State or Federal agency may obtain review of any final decision by the Commission to remand under paragraph (2) in the United States Court of Appeals for any circuit in which such party is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia circuit. The reviewing court shall

reverse any such decision if it finds such decision is arbitrary or capricious.

(B) FINDINGS.—Any person aggrieved or adversely affected by a final finding of the Commission under paragraph (1) may within 60 days thereafter file a petition for review of such finding in the United States Court of Appeals for any circuit in which the party involved in such determination is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia circuit. The reviewing court shall reverse any such finding of the Commission if the State or Federal agency determination involved is supported by substantial evidence.

(c) STATE AUTHORITY.—

(1) GENERAL RULE.—A Federal or State agency having regulatory jurisdiction with respect to the production of natural gas is authorized to make determinations referred to in subsection (a) of this section.

(2) WAIVER.—

(A) IN GENERAL.—Any Federal or State agency may, in whole or in part, waive its authority to make determinations referred to in subsection (a)(1) of this section by entering into an agreement in accordance with

subparagraph (B). If such agency executes such a waiver, the Commission shall, consistent with the agreement, make the determinations which would otherwise be made by such Federal or State agency until the earlier of—

(i) the expiration of the period specified in the agreement; or

(ii) the date such agency transmits to the Commission written notice that it terminates such waiver and assumes the authority to make determinations referred to in subsection (a)(1) of this section.

Any waiver, or termination of any waiver, shall not apply to any determination with respect to any petition therefor which is pending before such agency or the Commission (as the case may be) on the date on which such a waiver or revocation is made.

(B) AGREEMENTS.—Any waiver under subparagraph (A) may be made only by a written agreement between the Federal or State agency involved and the Commission. Any such agreement shall set forth the terms and conditions applicable to such waiver.

(3) PROCEDURES APPLICABLE.—Determinations of a Federal or State agency referred to in subsection (a)(1) of this section shall be made in accordance with the procedures generally applicable to such agency for the making of such determina-

tions or comparable determinations under the provisions of Federal or State law, as the case may be, pursuant to which they exercise their regulatory jurisdiction. The Commission may prescribe the form and content of filings with a Federal or State agency in connection with determinations made under this section.

(4) JUDICIAL REVIEW.—Any such determination referred to in subsection (a)(1) of this section made in accordance with procedures described in paragraph (3) shall not be subject to judicial review under any Federal or State law except as provided under subsection (b) of this section.

(d) EFFECT OF DETERMINATIONS.—For purposes of this chapter—

(1) GENERAL RULE.—Any final determination referred to in subsection (a)(1) of this section made by a Federal or State agency (or by the Commission under subsection (c)(2) of this section which relates to any natural gas and which is no longer subject to review by the Commission under this section or to judicial review shall thereafter be binding with respect to such natural gas. The preceding sentence shall not apply to any final determination—

(A) if in making such determinations the Commission or such Federal or State agency relied on any untrue statement of a material fact; or

(B) if there was omitted a statement of material fact necessary in order to

make the statements made not misleading, in light of the circumstances under which they were made, to the Federal or State agency in making such final determination or to the Commission in reviewing such determination.

(2) APPLICATION OF TITLE 18.—Any untrue statement or omission of material fact to a Federal or State agency upon which the Commission relied shall be deemed to be statement or entry under section 1001 of Title 18, United States Code.

(e) INTERIM COLLECTION OF MAXIMUM LAWFUL PRICE.—

(1) COLLECTION OF SECTION 3319 PRICE.—

(A) GENERAL RULE.—Effective beginning on the first day of the first month beginning after November 9, 1978, a seller of natural gas which is produced from a new well may, in accordance with subparagraph (B), charge and collect the appropriate maximum lawful price under section 3319 of this title for any first sale of such natural gas.

(B) REQUIREMENTS.—A seller may charge and make collections under subparagraph (A) only in accordance with the following requirements:

(i) SWORN STATEMENT.—Before any such collection is

made, the seller shall file with the Commission, and any Federal or State agency having authority to make determinations referred to in subsection (a)(1) of this section, a written sworn statement that such natural gas is produced from a new well and that such seller believes in good faith that such natural gas is eligible under this chapter to be sold at a price not less than the appropriate maximum lawful price under section 3319 of this title.

(ii) PETITION FOR DETERMINATION.—Within 90 days after November 9, 1978, the seller files a petition to such Federal or State agency for a determination under this section.

(iii) COLLECTION SUBJECT TO REFUND.—Any such collection made by the seller pending a determination under this section shall be collected subject to a condition of refund, with interest, in the event it is determined by such Federal or State agency that the applicable maximum lawful price is lower than that provided under section 3319 of this title.

(2) ALTERNATE INTERIM COLLECTION AUTHORITY.—

(A) GENERAL RULE.—Promptly after November 9, 1978, the Commissioner shall, by rule or order, provide one or more methods under which a seller of natural gas may in accordance with requirements established, and for such period as may be prescribed, under such rule or order, charge and collect for any first sale of such natural gas the maximum lawful price under subchapter I of this chapter for which a petition is filed for a determination under this section in any case in which such price exceeds the appropriate maximum lawful price under section 3319 of this title.

(B) COLLECTION SUBJECT TO REFUND.—Any such collection made by the seller pending a determination under section 503 shall be collected subject to a condition of refund, with interest. Such refund with interest shall be paid, in accordance with the rule under subparagraph (A), unless it is determined under this chapter that the applicable maximum lawful price is equal to or greater than that collected. In addition, such seller shall comply with such requirements as the Commission shall prescribe in the applicable rule or order to provide adquate assurance that funds, to the extent attributable to a price in excess of the appropriate maximum lawful frice undr subchapter I of this chapter are available in the event of such refund.

(3) COLLECTION AFTER INITIAL DETERMINATION.—

(A) GENERAL RULE.—Effective beginning on the date of the notice of a determination under subsection (a)(2), of this section, a seller of natural gas covered by such determination may, in accordance with subparagraph (B), charge and collect the appropriate maximum lawful price applicable under such determination.

(B) REQUIREMENTS.—A seller may charge and make collections under subparagraph (A) if such collection is subject to conditions prescribed by the Commission to assure refund, with interest, in the event it is determined under this chapter that the applicable maximum lawful price is lower than that provided under section 3319 of this title.

The Natural Gas Policy Act, codified at 15 U.S.C. §3414, provides:

(a) GENERAL RULE.—It shall be unlawful for any person—

(1) to sell natural gas at a first sale price in excess of any applicable maximum lawful price under this chapter; or

(2) to otherwise violate any provision of this chapter or any rule or order under this chapter.

(b) CIVIL ENFORCEMENT.—

(1) IN GENERAL.—Except as provided in paragraphs (2) and (3), whenever it appears to the Commission that any person is engaged or about to engage in any act or practice which constitutes or will constitute a violation of any provision of this chapter, or of any rule or order thereunder, the Commission may bring an action in the District Court of the United States for the District of Columbia or any other appropriate district court of the United States to enjoin such act or practice and to enforce compliance with this chapter, or any rule or order thereunder.

* * *

(6) CIVIL PENALTIES.—

(A) IN GENERAL.—Any person who knowingly violates any provision of this chapter, or any provision of any rule or order under this chapter, shall be subject to—

(i) except as provided in clause (ii) a civil penalty, which the Commission may assess, of not more than $5,000 for any one violation; and

(ii) a civil penalty, which the President may assess, of not more than $25,000, in the case of any violation of an order under section 3362 of this section or an order or supplemental order under section 3363 of this section.

(B) DEFINITION OF KNOWING.—For purposes of subparagraph (A), the term "knowing" means the having of—

(i) actual knowledge; or

(ii) the constructive knowledge deemed to be possessed by a reasonable individual who acts under similar circumstances.

(C) EACH DAY SEPARATE VIOLATION.—For purposes of this paragraph, in the case of a continuing violation, each day of violation shall constitute a separate violation.

* * *

(c) CRIMINAL PENALTIES.—

(1) VIOLATIONS OF CHAPTER.—Except in the case of violations covered under paragraph (3), any person who knowingly and willfully violates any provision of this chapter shall be subject to—

(A) a fine of not more than $5,000; or

(B) imprisonment for not more than two years; or

(C) both such fine and such imprisonment.

(2) VIOLATION OF RULES OR ORDERS GENERALLY.—Except in the case of violations covered under paragraph

(3), any person who knowingly and willfully violates any rule or order under this Chapter (other than an order of the Commission assessing a civil penalty under subsection (b)(4)(E) of this section), shall be subject to a fine of not more than $500 for each violation.

(3) VIOLATIONS OF EMERGENCY ORDERS.—Any person who knowingly and willfully violates an order under section 3362 of this title or an order or supplemental order under section 3366 of this title shall be fined not more than $50,000 for each violation.

(4) EACH DAY SEPARATE VIOLATION.—For purposes of this subsection, each day of violation shall constitute a separate violation.

(5) DEFINITION OF KNOWINGLY.—For purposes of this subsection, the term "knowingly", when used with respect to any act or omission by any person, means such person—

(A) had actual knowledge; or

(B) had constructive knowledge deemed to be possessed by a reasonable individual who acts under similar circumstances.

Opposition

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No. 81-1232

In the Supreme Court of the United States

OCTOBER TERM, 1981

TEXAS, ET AL., PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether Title V of the Natural Gas Policy Act of 1978, which permits the states to make price category determinations for certain sales of natural gas, infringes upon the powers reserved to the states by the Tenth Amendment.

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In the Supreme Court of the United States

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FEDERAL ENERGY REGULATORY COMMISSION AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 661 F.2d 832. The opinion of the district court (Pet. App. B) is reported at 494 F. Supp. 636.

JURISDICTION

The judgment of the court of appeals (Pet. App. C) was entered on September 22, 1981. The petition for a writ of certiorari was filed on Decem-

ber 21, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Tenth Amendment and the pertinent provisions of the Natural Gas Policy Act of 1978, 15 U.S.C. (Supp. IV) 3301 *et seq.*, are set forth at Pet. App. S-1 to S-14.

STATEMENT

1. Title I of the Natural Gas Policy Act of 1978 ("NGPA"), 15 U.S.C. (Supp. IV) 3301 *et seq.*, establishes pricing categories for wellhead ("first") sales of natural gas. Under the statutory scheme, gas may be sold at the prices established in Sections 102, 103, 107 and 108 of Title I only if there is a prior determination, pursuant to Section 503 of the Act, 15 U.S.C. (Supp. IV) 3413, that such gas qualifies to be sold at those prices.[1]

In Section 503(a) and (c)(1), Congress authorized state or federal agencies having regulatory jurisdiction over the production of natural gas to determine whether certain categories of gas may be sold

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[1] Section 102, 15 U.S.C. (Supp. IV) 3312, prescribes the maximum lawful price for "new" natural gas and certain gas produced from the Outer Continental Shelf; Section 103, 15 U.S.C. (Supp. IV) 3313, prescribes the maximum lawful price for gas produced from new, onshore production wells; Section 107, 15 U.S.C. (Supp. IV) 3317, prescribes the maximum lawful price for high-cost gas; Section 108, 15 U.S.C. (Supp. IV) 3318, prescribes the maximum lawful price for stripper well natural gas.

The four remaining pricing categories in Title I, 15 U.S.C. (Supp. IV) 3314-3316, 3319, are not subject to the eligibility determination provisions of Section 503 of the Act, 15 U.S.C. (Supp. IV) 3413, that are at issue here.

at the prices prescribed in Sections 102, 103, 107, or 108 of the Act. Under Section 503(c)(2), 15 U.S.C. (Supp. IV) 3413(c)(2), the state or federal agency authorized to make these determinations may waive, in whole or in part, its authority to make those determinations pursuant to written agreement with the Federal Energy Regulatory Commission ("Commission").

If a state or federal agency chooses to make the determinations described in Section 503(a), those determinations are to be made pursuant to the agency's normal procedures; the Commission, however, may prescribe the form and content of the filings to be submitted to the state or federal agency. Section 503(c)(3), 15 U.S.C. (Supp. IV) 3413(c)(3). In addition, the state or federal agency must notify the Commission of its determinations, and must include in its notice of determination such substantiation as the Commission may require. Section 503(a)(2), 15 U.S.C. (Supp. IV) 3413(a)(2). The state or federal agency determinations are subject to review by the Commission under a substantial evidence standard. Section 503(b)(1)(A), 15 U.S.C. (Supp. IV) 3413(b)(1)(A).

2. On November 20, 1978, petitioners, the States of Texas, Louisiana and Oklahoma, brought this action in the United States District Court for the Western District of Oklahoma, challenging the constitutionality of the Natural Gas Policy Act of 1978. Petitioners sought a declaratory judgment that certain provisions of the Act impermissibly infringe on state sovereignty, in violation of the Tenth Amendment. The district court granted the Commission's motion for summary judgment (Pet. App. B-1 to B-41; *id.* at D-1 to D-2). In so doing, the court rejected petitioners' argument that "they are coerced into administering the Act, spending state funds for the

operation of a federal program on behalf of a federal agency" (*id.* at B-36). The court concluded (*id.* at B-37):

> The NGPA in § 503 "authorizes" appropriate state agencies to make certain determinations. There is no requirement of state cooperation and no sanctions are levied in the event a state agency refuses to act. While the Act requires the agreement of FERC before a waiver of state authority is effective, § 503(c)(2), there is no mandatory requirement of state agency action even absent FERC's agreement, and no sanction provided for a state whose agency does not act. Thus, there is no "coercion" in the constitutional sense, and the Act in this respect must be upheld.

In addition, the court observed (*id.* at B-37 to B-38) that because there was no evidence that any state agency had "attempted to obtain FERC's agreement to a waiver" pursuant to Section 503(c)(2), 15 U.S.C. (Supp. IV) 3413(c)(2), there was no occasion to consider whether the Commission could, consistent with the Tenth Amendment, decline a state request that the Commission, not the state, make the determinations required by Section 503.

The court of appeals affirmed (Pet. App. A-1 to A-18), concluding that the district court's reasoning was wholly consistent with this Court's ruling in *Hodel* v. *Virginia Surface Mining & Reclamation Association*, No. 79-1538 (June 15, 1981).

ARGUMENT

The decision of the court of appeals is correct, does not conflict with the decisions of this Court or any other court, and does not warrant review.

Petitioners' sole contention (Pet. 3) is that the procedures established in Section 503 of the Natural

Gas Policy Act of 1978 compel the states "to administer a federal program" and therefore violate the Tenth Amendment limitations announced in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976).[2] This contention is foreclosed by *Hodel* v. *Virginia Surface Mining & Reclamation Association, supra.*

In that case, this Court rejected a similar challenge to the constitutionality of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. (Supp. III) 1201 *et seq.*, a statute closely comparable to the statute at issue here.[3] The critical element in both statutes is that the states are not compelled, in any constitutionally impermissible way, to do anything. As this Court concluded in *Virginia Surface Mining* (slip op. 21-22), in language fully applicable to the statute in suit:

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[2] Petitioners do not claim that the Act was not within Congress' authority under the Commerce Clause. The district court (Pet. App. B-22 to B-28) and court of appeals (*id.* at A-11 to A-14) correctly rejected petitioners' Commerce Clause arguments. See *Hodel* v. *Virginia Surface Mining & Reclamation Association, supra,* slip op. 8-17.

[3] The Surface Mining Act establishes a two-stage program for the regulation of surface coal mining. The interim program mandates immediate promulgation and federal enforcement of certain environmental protection performance standards. The states are free to pursue their own regulatory program during the interim phase, and they are permitted, but not required, to assist the Secretary of the Interior in enforcing the interim standards. Under the permanent phase, a permanent regulatory program is to be adopted for each state, incorporating all of the Act's performance standards. Any state wishing to assume permanent regulatory authority over surface coal mining operations on nonfederal lands within its borders is required to submit a permanent plan to the Secretary for his approval. If the state program is not approved or the state does not submit a proposed permanent plan, then the Secretary is required to implement a suitable federal plan.

> [T]he States are not compelled to enforce the [federal] standards, to expend any state funds, or to participate in the federal regulatory program in any manner whatsoever. If a State does not wish to submit a proposed permanent program that complies with the Act and implementing regulations the full regulatory burden will be borne by the Federal Government. Thus, there can be no suggestion that the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.

The decisions by both courts below (Pet. App. A-14 to A-18; *id.* at B-36 to B-38) are fully consistent with this Court's analysis in *Virginia Surface Mining*.[4]

Nor can petitioners fairly argue that, because intrastate gas is involved, the statute intrudes upon

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[4] As the quoted passage from *Virginia Surface Mining* makes plain, petitioners' reliance (Pet. 8-9) on *District of Columbia* v. *Train*, 521 F.2d 971 (D.C. Cir. 1975), vacated *sub nom. EPA* v. *Brown*, 431 U.S. 99 (1977), *Brown* v. *EPA*, 521 F.2d 827 (9th Cir. 1975), vacated, 431 U.S. 99 (1977), and *Maryland* v. *EPA*, 530 F.2d 215 (4th Cir. 1975), vacated *sub nom. EPA* v. *Brown*, 431 U.S. 99 (1977), is misplaced. In those cases, the EPA Administrator had construed the Clean Air Act as authorizing him, in the event a state failed to submit an acceptable implementation plan regulating the sources of air pollution, to promulgate a detailed federal plan and to compel the states to implement the plan by enacting legislation and appropriating funds. Noting that the Administrator's interpretation of his powers under the Clean Air Act would raise serious constitutional questions, the courts held that the Act did not authorize the Administrator to direct the states to implement the federal plans. Here, in contrast to the EPA cases, the Natural Gas Policy Act leaves the states free to decide whether to participate in the eligibility determination process of Section 503.

state prerogatives in regulating the conservation of natural resources within its borders. The district court correctly rejected this argument, stating (Pet. App. B-31; citations and footnote omitted):

> [The claim] that the conservation of natural resources is a traditional state function with which Congress may not interfere, is rejected in a long line of precedent recognizing the states' traditional role in conservation of natural resources, but holding that the states may not encroach, through conservation measures, upon preemptive federal regulation under the [Natural Gas Act]. * * * Congress may preempt state conservation regulation which interferes with or burdens interstate commerce. * * * Moreover, [petitioners] have not demonstrated how the NGPA conflicts with, or detracts from, their current conservation policies or procedures to the extent that traditional governmental functions are displaced.

In *Virginia Surface Mining & Reclamation Association, supra*, slip op. 23, this Court disposed of a like claim by reiterating that the Tenth Amendment does not "limit[] congressional power to pre-empt or displace state regulation of private activities affecting interstate commerce." See *id.* at 23-26. There is no question here that the Act is within Congress' authority to regulate interstate commerce (see note 2, *supra*).

Finally, petitioners argue (Pet. 6-7) that if the states do not make the price determinations under Section 503, no other agency can or will make these determinations. As a practical matter, petitioners assert, they are coerced into making the Section 503 determinations because the natural gas industries that operate within their jurisdictions would not continue to operate unless they could sell their gas

at the higher prices established in Sections 102, 103, 107 and 108 of the Act.

But Congress provided in Section 503(c)(2) of the Act, 15 U.S.C. (Supp. IV) 3414(c)(2), that the states may waive the right to make the eligibility determination by written agreement between the state agency involved and the Commission. Section 503(c)(2)(B), 15 U.S.C. (Supp. IV) 3413(c)(2)(B). Moreover, the Act provides that if a state agency executes such a waiver, the Commission is responsible for making the determinations. Section 503(c)(2)(A), 15 U.S.C. (Supp. IV) 3413(c)(2)(A). Thus, any state that wishes to receive the benefits of the higher prices for natural gas under the NGPA but does not wish to accept any responsibility for administering the Act need only execute a waiver agreement with the Commission. As the district court noted (Pet. App. B-37 to B-38), no state has sought to waive its authority to make the Section 503 determinations. To be sure, there is a "temptation" for a state to perform the determinations itself, since, in the absence of a Section 503 determination of eligibility, the gas is subject to the lower prices set out in Sections 104, 105, 106, or 109 of the Act. But that type of incentive has never been deemed to be an impermissible "power akin to undue influence * * *." *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 589-590 (1937).[5]

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[5] Because Title V of the NGPA imposes no regulatory obligations of any sort on the states, disposition of the petition in this case need not be deferred pending this Court's decision in *FERC* v. *Mississippi*, No. 80-1749 (argued Jan. 19, 1982).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Petitioner's Reply Brief

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

* * *

The States of Texas, Louisiana, and Oklahoma
Petitioners,

V.

Federal Energy Regulatory Commission and United States of America,
Respondents.

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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April 20, 1982

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IN THE
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* * *

The States of Texas, Louisiana, and Oklahoma
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Federal Energy Regulatory Commission and United States of America,
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PETITIONERS' REPLY TO BRIEF IN OPPOSITION

* * *

REPLY TO BRIEF IN OPPOSITION

A reply to the government's brief in opposition is necessary because the government's opposition to review by this Court is based on an incorrect statement of fact. The Natural Gas Policy Act of 1978 imposes a variety of price ceilings on all natural gas produced in the United States. For some of the Act's categories of natural gas, the Act provides for "incentive" ceiling prices designed to encourage production and increase interstate supplies. In order to collect these prices for the gas from any well, however, the Act requires that certain determinations first be made to establish the applicability of the prices. Although the Act was made effective within three weeks of enactment, no federal agency existed, was provided for by Congress, or now exists with the resources and personnel necessary to make the

required determinations. The result was and is that petitioner states are required to make these determinations with their own agencies and resources or suffer loss of tax and royalty revenues which they are entitled to collect under the Act and which they could collect in the absence of the Act. This scheme, we submit, clearly constitutes unconstitutional coercion of petitioner states to implement a federal regulatory program. In response, the government now asserts, for the first time in this litigation, that the Act's "incentive" ceiling prices may be obtained by producers in petitioner states —thereby minimizing petitioner states' revenue losses —without petitioner states undertaking to make the required determinations. Br. in Opp. 8. This assertion is without basis in the record and contrary to fact.

The government does not dispute that petitioner states will suffer additional revenue losses under the Act if the pricing determinations necessary to collect the Act's incentive prices are not made. Nor does it directly dispute that no federal agency exists capable of making these determinations. Indeed, in the court below the government restated, without any indication of disagreement, petitioners' contentions that "Congress failed to provide an alternative to state participation in the administration of the NGPA" and that "there is no other agency which can practicably implement the federal program." Gov. Br. in Ct. of App. 52, 53. Acknowledging that state agencies "may have been Congress's preferred vehicle" for implementation of the Act's pricing provisions, the government explicitly refused to state "whether or not the Commission will take on the responsibility" if the states do not. *Id.* 60-61.

The government's argument in the court below was that petitioner states were not coerced to make the pricing determinations necessary to implement the Act, even if the Commission would not and could not do so

—petitioner states simply "may decline" to do so and "the Commission cannot compel compliance"—because the alternative remained that the Act not be implemented. *Id.* 54-55. "[P]ersons producing natural gas (including the states themselves) can continue to sell natural gas," the government argued, even if the Act is not implemented. *Id.* 58. Producers would then be unable to sell at the incentive prices allowed for new and high-cost gas by sections 102, 103, 107, and 108 of the Act, 15 U.S.C. §§3312, 3313, 3317, and 3318, but according to the government, they could still sell, regardless of the cost of exploration or production, at the price allowed for "other" gas by section 109, 15 U.S.C. §1319, the lowest of the Act's specific prices.* The argument was, in effect, that Congress was mistaken in believing that the Act's incentive prices were necessary in believing that the Act's purpose of increasing natural gas production and interstate supplies.

The government has taken a different approach in this Court. Instead of arguing that petitioner states had the option of allowing the Act not to be implemented, the government now implies that there *was* an alternative means of implementation. Under Section 503(c)(2)(B) of the Act, 15 U.S.C. §3413(c), the government states, "the states may waive the right to make the eligibility determination by written agreement between the state agency involved and the Commission," and under Section 503(c)(2)(A), "if a state agency executes such a waiver, the Commission is responsible for making the determinations." Br. in Opp. 8. "Thus," the government concludes, "any state that wishes to receive the benefits of the higher prices for natural gas under the NGPA but does not wish to accept any responsibility for ad-

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* As of January 1982, the section 102 price is $3.003 per MMBtu and the section 109 price is $2.128. 46 Fed. Reg. 53564 (Oct. 30, 1981).

ministering the Act need only execute a waiver agreement with the [Federal Energy Regulatory] Commission." *Ibid.* This conclusion does not follow from the stated premises and is demonstrably incorrect as a matter of fact.

First, prior to the government's present brief, the Commission had consistently taken the position that it may refuse to permit a state to "waive the right" to make pricing determinations. The Commission had interpreted Section 503(c)(2) of the Act as giving it "the discretion to agree or not to agree to a proposal for a waiver and thus to grant or refuse a request for a waiver." 44 Fed. Reg. 48666 (Aug. 20, 1979). More important, whether or not the Commission is theoretically "responsible" for making the pricing determinations if the states do not, the fact—still not directly controverted by the government—is that the Commission was and is incapable of doing so and has refused to do so. Rejecting producer complaints that the result is "unlawful or inequitable," the Commission has refused to accept applications for pricing determinations while also refusing to permit collection of incentive prices until the determinations are made by state agencies. 42 Fed.Reg. 56496-97 (Dec. 1, 1978); 18 CFR §278.202. It is hardly surprising, therefore, that, as the government notes, "no state has sought to waive its authority to make the Section 503 determinations." Br. in Opp. 8. No state could refuse to make those determinations without incurring the revenue losses that would result from their not being made.

The government's reliance on *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937), for the argument that the Act merely provides "a 'temptation' for a state to perform the determinations itself" (Br. in Opp. 8) is therefore misplaced. The Social Security Act, involved in *Steward Machine*, was an exercise of Congress's power to tax and spend, not like the NGPA, an exercise of Congress's coercive regulatory power under the Com-

merce Clause. Title II of the Social Security Act (unemployment compensation) offered the states a true option to participate in the Act's administration or have it administered by a federal agency; it did not, like the NGPA, threaten the states with financial losses for refusal to implement a federal regulatory program that could not otherwise be implemented.

The government is similarly mistaken in arguing that the NGPA is "closely comparable" to the Surface Mining and Reclamation Act of 1977, upheld in *Hodel v. Virginia Surface Mining and Reclamation Assn.*, _____U.S._____, 101 S.Ct. 2352 (1981). Br. in Opp. 5. Unlike the NGPA, the surface Mining Act by its terms was not to become effective in any state that declined to implement its requirements until *after* the necessary federal regulatory apparatus had been established. As this Court pointed out in *Virginia Surface Mining:*

> No later than 8 months after adoption of either a state-run or federally administered permanent regulatory program for a State, all surface coal mining and reclamation operations... within that State must obtain a new permit issued in accordance with the applicable regulatory program.

101 S. Ct. at 2358. If a state did not choose to adopt a regulatory program, mining operators in that state could continue to operate as before until a federal regulatory program was established. The NGPA, however, by its terms became effective three weeks after enactment regardless of whether a federal or state agency capable of implementing the Act had been established. Intrastate sales of natural gas could thereupon no longer be made at free market prices, and no sales could be made even at the Act's ceiling prices until the required determinations were made, despite the fact

that no federal agency existed that could or would make the determinations.

The NGPA's waiver provision would be meaningful, would give the states a real option, if the NGPA had provided that free market pricing of intrastate gas could continue in any state that declined to make pricing determinations until the Commission was willing and able to make those determinations. This was the regulatory framework adopted in the Surface Mining Act; a similar framework was not adopted in the NGPA, its legislative history makes clear, because Congress and the Commission were agreed that the regulatory burden would be too great for the Commission and that the Act could be implemented only if the states assumed the burden.

Finally, the government is also mistaken in arguing that the decision below does not conflict with decisions of any other court. As enforced by the Commission in accordance with the intent of Congress, the NGPA imposes regulatory burdens on petitioner states indistinguishable from those found to be constitutionally impermissible in *District of Columbia v. Train*, 521 F.2d 971 (D.C. Cir. 1975), *vacated sub nom EPA v. Brown*, 431 U.S. 99 (1977), cited by this Court in *Virginia Surface Mining, supra*, 101 S.Ct. at 2366. Here, as there, it is clear that Congress has attempted to "commandeer the regulatory powers of the states, along with their personnel and resources, for use in administering and enforcing a federal regulatory program." *Id.* at 992.

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